

**DELAWARE DEPARTMENT OF JUSTICE  
COMMON INTEREST COMMUNITY  
OMBUDSPERSON**



**2021 ANNUAL REPORT**

## *Assisting Common Interest Communities to Understand Their Rights and Responsibilities, and the Processes Available to Resolve Disputes*

The Common Interest Community Ombudsperson shall:

*“[M]ake an annual report of the Office’s activities to the Governor, the Attorney General, the General Assembly, and the Chief Justice of the Supreme Court on or before December 1 of each year. ... Each such report shall contain:*

- a. Statistics on the number of inquiries and complaints handled by the Office.*
- b. Information on education and outreach efforts by the Office.*
- c. Concerns expressed to the Office by declarants, common interest community associations, the executive board of a common interest community association, unit owners in common interest communities, or other interested parties.*
- d. Legal developments affecting common interest communities.*
- e. Recommendations for changes to Delaware law or rules of court procedure designed to improve the regulation and operation of common interest communities made by the Ombudsperson and the Common Interest Community Advisory Council.*
- f. Any other information deemed appropriate by the Ombudsperson.”*

29 Del. C. §2544 (16).

### *Acknowledgements*

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# Introduction

The General Assembly created the Office of the Common Interest Community Ombudsperson in the Department of Justice in August 2014. The Office assists members of residential “common interest communities” such as condominiums, cooperatives and “planned unit developments” (or subdivisions of single-family homes), to understand their rights and responsibilities and the processes available to them. Where possible, the Ombudsman tries to resolve disputes among members of the common interest community, without resort to the judicial system.

The Act requires the Ombudsperson to submit an annual report each year. 29 *Del. C.* §2544 (16). This report covers 2021.

## What is an Ombudsperson?

An ombudsperson (or ombudsman) is a government official who receives, investigates, and reports on complaints, and tries to resolve problems fairly.

The Common Interest Community Ombudsperson’s statutory charge is to “assist [those involved in common interest communities] in understanding their rights and responsibilities and the processes available to them according to the law, regulations, and documents governing their respective common interest community.” 29 *Del. C.* §2544 (2).

## Community Served by the Office of the Ombudsperson.

Common interest communities include condominiums, cooperatives, and planned communities. All share common features including they are authorized by *recorded declarations of deed restrictions*, covenants, or conditions, creating *mandatory membership* associations, to govern and collect *mandatory, enforceable annual assessments* for the maintenance of common areas or common elements of the community such as streets, streetlights, open space, storm water management ponds, and amenities such as playgrounds, clubhouses, swimming pools, and many others.

Unlike the Delaware Uniform Common Interest Ownership Act, (the “DUCIOA”), the law creating the Office of the Ombudsperson applies to all common interest communities regardless of their size or when created.

The members of the “Common Interest Community” served by the Office of the Ombudsperson include:

- Homeowners or “unit owners” in common interest communities
- Developers or “declarants” who “declare” the deed restrictions
- Homeowners’ Associations (HOA), condominium or cooperative councils, Property Owners’ Associations (POA), and maintenance corporations

- Executive boards of common interest community associations, and
- Other interested parties like real estate professionals, lawyers, and Association managers.

### **The Need Addressed by the Office of the Ombudsperson.**

The General Assembly explained its reason for creating the Office in the synopsis to House Bill No. 308 (April 24, 2014):

In Delaware, county and municipal governments have required that land developers create common interest communities to administer, maintain, or improve common elements in the community such as pools, community centers, storm water management systems, or other common space or infrastructure. These communities are created by legal documents drafted by the developer and are managed by those living in these communities. This system can create difficulties for those living in these communities, especially when disputes arise.

This bill [creates] an Office of the Common Interest Community Ombudsman. The bill [empowers] the Ombudsman to assist common interest communities to understand their rights and responsibilities and to resolve disputes without recourse to the judicial system.

The bill ...also [creates] a Common Interest Community Advisory Council to advise and assist the Ombudsman and to undertake a review of the current common interest community system and make recommendations to the Ombudsman for changes to Delaware law and rules of court procedure to improve the system, with the hope these recommendations would be incorporated into legislation by the 148th General Assembly.

### **Overview of the Services Available Through the Ombudsperson**

The Ombudsperson has the powers and duties assigned in 29 *Del. C.* §2544 (1)-(20). They fall into 6 functions:

- **Create** processes, forms, and rules for: a model Internal Dispute Resolution (IDR) process for communities to adopt or adapt; Alternative Dispute Resolution (ADR) procedures for communities; a “Contact & Complaint” form to engage the Office; model Fair Election Procedures; and others.
- **Educate** members of Common Interest Communities-through a website, publications, and presentations to communities and groups throughout the State. The Office arranges and takes part in educational opportunities and workshops for members of Common Interest Communities. The Office also takes part in public meetings to gain an understanding of the issues facing common interest communities in Delaware. Most often, the Ombudsman responds to an increasing number of emails and phone calls requesting help “in

understanding the rights and responsibilities and the processes available according to the law, regulations and documents governing the respective common interest community.”

- **Mediate**, arbitrate and supply other Alternative Dispute Resolution (ADR) options when the parties consent. ADR is available even without filing an “internal” complaint if the parties agree.
- **Investigate “potential violations of the law, regulations or documents governing a common interest community”** first by reviewing complaints not resolved at the Association level through the statutorily required “Internal Dispute Resolution” and, when necessary, issuing subpoenas and referring meritorious allegations of violations of existing Delaware law to other units of the Department of Justice, or to other law enforcement agencies.
- **Election Services:** Provide vote monitoring, vote counting, and other services to promote fair elections to homeowners’ associations.
- **Advisory Council:** Support the Council as requested by Council, which advises the Ombudsman about issues related to common interest communities on statutorily required subjects:
  - a. Mechanisms to increase the collection rate for common interest community assessments.
  - b. Developing conflict resolution procedures within common interest communities.
  - c. The feasibility of mandatory mediation, arbitration, or other forms of ADR for disputes not able to be resolved within common interest communities and, if possible, how to implement a process.
  - d. Developing mechanisms for the registration of common interest communities with the State or other political subdivision.
  - e. Any other topic the Council deems appropriate.

## Status of the Office

This message and report cover 2021. The Office's operations continue to be affected by the ongoing COVID-19 pandemic, but the office has adjusted procedures to accommodate the "new normal" and continues to operate.

In 2018 we found a trend of annual increases of the number of "inquiry" requests and responses over each prior year, and the number of requests for "Review" of unresolved IDR complaints. 2019 numbers came down from the peak, and numbers have been markedly lower since the start of the pandemic. While the pandemic may be the cause of these changes, there may be other causes.

Activity	2018	2019	2020	2021
<b>Presentations to Communities (mostly remote since 2020)</b>	22	32	3	11
<b>Workshops (mostly remote since 2020)</b>	7	7	1	4
<b>Advisory Council and Committee Meetings</b>	18	16	12	21
<b>Investigations Supervised-Criminal</b>	4	4	4	2
<b>*Email Inquiry Responses Re: Rights, Responsibilities &amp; Processes</b>	<b>730+</b>	<b>552</b>	<b>656</b>	<b>339</b>
<b>Complaints Filed after Unsuccessful IDR</b>	<b>170</b>	<b>114</b>	<b>56</b>	<b>57 received</b> <b>41 resolved</b>
<b>Services for Elections: Vote monitoring and ballot counting</b>			<b>1</b>	<b>2</b>

## Refinements to complaint handling processes

**In 2021 complaint handling** was further refined. Community Association Institute estimates approximately 2500-3000+ common interest communities in Delaware, home to roughly 239,000 owners or residents. Based on the 2020 census data for Delaware, this represents roughly 24% of Delawareans. The Office has only one full-time employee (the Ombudsperson) and a fraction of one part-time paralegal to serve these Delawareans. The Office also receives assistance from financial investigator when investigation alleged financial malfeasance.



In an effort to respond to inquiries quickly, limit the need for homeowners to file formal complaints, and make efficient use of the Office's limited resources, the Office responds to hundreds of inquiry by phone and email. This helps quickly address some of the more common inquiries such as when homeowners seek legal advice or substitution of the judgment of the board with the complainant's or the Ombudsman's judgment, neither of which are within the powers of the Office. Additionally, we are often able to quickly refer homeowners who seek assistance that we can't provide to other resources and agencies they may be able to help such as the Court of Common Pleas Community Mediation Program. While this approach is efficient, responding to the high volume of calls and emails strains the resources of the Office.

## **Internal Processes**

Streamlined processes have continued to help improve the Office's processing and response times for complaints. As new complaints arrive, we log them in, scan them and email detailed letters to the parties more quickly, seeking agreement to mediate or arbitrate. We also encourage both sides to consider our recommended "Meet and Confer" option for internal dispute resolution. We try to convince parties to participate in consensual ADR to avoid the potential costs of Court action.

As in prior years, many complaints present issues that are beyond the Ombudsman's authority. We are not a "court" that can decide cases or issue orders and do not decide cases unless the parties consent to binding arbitration. Instead, we "assist [parties] in understanding their rights and responsibilities and the processes available according to the law, regulations and documents governing the respective common interest community." The Office's revised letters to homeowners help set more reasonable expectations, but we still often receive requests for help that we cannot provide.

The Office is unable to review complaints unless meet the statutory requirements to trigger the Ombudsperson's authority. Two common issues with received complaints are:

- Many complainants do not submit a statutorily required "Internal Dispute Resolution" Complaint Form to their board. Instead, they send emails or other informal correspondence to try and meet the requirement of having attempted "Internal Dispute Resolution." The Ombudsman Act requires complainants to first send complaints "in writing," on a "form," to the board. We require complainants to organize their complaint by "citing and quoting" their governing documents or governing law and explaining the violation, they allege. "Potential" violations of law and documents "*governing* a common interest community" is a limitation on the Ombudsman's authority. We need the information to understand how much of what law (*e.g.*, the "DUCIOA") applies.
- Some complainants file an IDR form, but do not "cite and quote" the part of the governing documents they allege violated. Homeowners are required to cite and quote from the relevant governing documents to clarify the nature of the alleged violation and

to facilitate the Ombudsman's review of the complaint. When followed, the "cite and quote" requirement minimizes mistakes by owners and boards in interpreting governing documents, leading to resolution of about 90% of complaints between homeowners and boards.

For matters where parties do not consent to ADR and where resolution of the issue would require a hearing and binding decision our closing letter refers the parties to several other process available, including private ADR, referral to the Court of Common Pleas' (free) "Community Mediation Program," and Court of Chancery for its special jurisdiction under 10 *Del. C. § 348*. To use the Office's resources efficiently, we are more selective in providing detailed reviews in complaints where the Office is unlikely to be able to resolve the dispute while encouraging parties to "meet and confer" or engage in mediation or arbitration.

Despite our efforts, the Office continues to spend significant amounts of time repeatedly providing explanations and copies of the procedure and statutes to those who do not read or follow statutorily required procedures. This diverts time from reviewing properly completed complaints, providing ADR, and other projects and delays processing of complaints.

### **Advisory Council**

The Advisory Council continues to meet every other month, an increase over the statutory requirement of four meetings per year. As in 2019 and 2020, Council invited speakers to present to the Council and public attendees. Speakers have educated attendees on a variety of topics including audit requirements and reserves studies.

As in 2019 and 2020, in 2021 the Advisory Council's Education Committee and a Mentoring Committee remained active. The pandemic severely limited educational presentations in 2020, and mentoring requests declined during the height of the pandemic. In 2021, all Advisory council meetings and community presentations on transition and governance issues were presented virtually. We presented the "Board Leadership Development Workshop" virtually after missing it in 2020 due to the Pandemic.

The Advisory Council Legislation Committee is studying several legislative proposals. The DUCIOA "clean-up" bill originally proposed in 2019 and delayed due to the pandemic was introduced, passed, and enacted into law in 2021. The Committee's study of offered legislation is ongoing. Legislators continue to request comment on proposed legislation of their own. Two members of Council and the Ombudsman continue to serve as "observers" to the National Conference of Commissioners on Uniform State Laws' discussions on amending the UCIOA. Some momentous changes were discussed and approved for recommendation to the States in this discussion. Another member is reporting to Council on Online Dispute Resolution programs in other states and the Delaware Justice of the Peace Courts.

## Education

The Office's website is continually updated to reflect updates in the law. The Office continues update and maintain a searchable and cross-referenced online version of DUCIOA as a resource for homeowners.

In 2021, we continued collecting updated JP Court forms for updating Council's online guide to **"Collecting Delinquent Assessments."** We anticipate completing this project in 2022. The Education and Collections Committee distributes the Guide at workshops, through the website, and through Justice of the Peace Court.

### Outreach: Workshops

To accommodate for the ongoing pandemic the Education Committee presented public workshops on Governance and Collection of Assessments remotely in 2021. The Governance Workshop was recorded and is now available on the Ombudsperson's website as a free video, as is the 2020 recording to the Ombudsman's introduction of the Office to the New Castle County Stormwater Management Workshop. Our partnership with the Keystone Chapter of CAI has been essential to recent presentations and online access without charge.

The Ombudsman and the Advisory Council's **Education Committee** provided educational virtual presentations to communities in each county during 2021. We presented Community Associations Institute's **"Board Leadership Development Workshop"** jointly with the Delaware Valley Chapter of CAI that returned in 2021 after being canceled in 2020. We invited those on our email list to Delaware Valley Chapter's Web Expo, which was offered free of charge. We circulated the information about CAI's Keystone Chapter education offerings.

In 2021 we doubled the size of our email list to over 700 and expanded notices to the **list** to announce every Advisory Council meeting and educational opportunities. Attendance at Advisory Council meetings increased from 3 or 4 members of the public at live meetings to over 40 lively attendees at some meetings. A link on our website invites users to add their contact information to our database to receive email. We do not provide our email list to others, but on request will distribute a message to our list.

We continue to answer hundreds of **telephone calls and emails** from homeowners, Association boards, and occasionally attorneys, about the services and procedures of the Office. We assist callers in "understanding their rights and responsibilities," and their governing documents. This often requires general information about the DUCIOA, the General Corporation Law, *Roberts Rules of Order*, the processes and needed use of Internal Dispute Resolution before filing a complaint for review by this Office, and other processes available through the Department of Justice, the Consumer Protection Unit, the Court of Common Pleas Community Mediation Program, the Insurance Commissioner's Office, the Bank Commissioners Office, Chancery and other Courts, and county code enforcement offices.

The Ombudsman attended 20-30 association meetings each year before the Pandemic (32 in 2019) to introduce individual communities to the processes, authority and limitations of the Ombudsman's Office, and answer questions, but remained at 20 in 2021. We arranged several Zoom presentations but failed to agree with communities on two outdoor community association meetings.

## **Dispute Resolution**

In 2021, the trend continued of fewer boards agreeing to submit disputes to mediation or arbitration through the Ombudsman's Office. However, we found greater success in convincing parties to agree to our referral to the Court of Common Pleas Community Mediation Program. Two were referred to the program in 2021 and were successfully resolved. The Community Mediation Program has advantages over our in-house process because it is free and, due to having more resources, tends to be faster.

The Ombudsman contacted the Bar Association's Conflict Resolution Committee to discuss informing that committee's members of the opportunity to learn more about Alternative Dispute Resolution in homeowners' associations and other common interest communities.

In 2020, we began a discussion with the University of Delaware's Biden School of Public Policy's, Mediation Program. We hope to develop a connection to put Boards and Community members in training for building mediation understanding and skills.

The Ombudsman conducted no mediations or arbitrations in 2021, in contrast to several mediations and arbitrations in 2019 and 2020. The referrals to the Court of Common Pleas Program are growing with our increased recommendation efforts.

In prior years, the Ombudsman attended the Community Associations Institute's (CAI) *Annual Law Seminar*, including a session on "Dispute Resolution What Works." It focused on California's "Internal Dispute Resolution" process--similar to Delaware's--which has inspired discussions with Boards and owners to move toward a process of "Meet and Confer" to resolve disputes instead of utilizing full board hearings. Several boards and owners we convinced to try it found it more effective than prior efforts at mediation or arbitration.

## **Election Services**

A growing number of communities are experiencing disputes over elections. Failing to adhere to bylaw requirements for quorum and notice are invalidating elections and actions by improperly elected boards. Every year since 2018 the Court of Chancery invalidated board actions and ordered new board elections overseen by a Special Master in at least one community when that community's board failure to adhere to bylaws "snowballed."

In 2021 the Ombudsperson attended and monitored 2 elections. Depending on the size of the election, the Ombudsperson either completed the vote counting process on-site or securely returned the ballots to a DOJ office for counting by the DOJ or the Department of Elections. The Ombudsperson always takes care to ensure that ballots are held securely, counted accurately with adequate checks and safeguards, and promptly recorded into a database for the election and then reported to the community.

The procedures for requesting election services from the office, formally established in 2018 and refined in the following years, are posted on the Office's website, and are functioning well. To request services a community must submit: a Petition from at least 15% of the voting interests to the Office of the Ombudsman; a form resolution for a board; an information sheet for a community to summarize election requirements from its bylaws; and a form agreement between the Ombudsman, the community, and Department of Elections. Fees, required by the Ombudsman's Act for election services, are the same whether provided by the Office of the Ombudsman or the Department of Elections.

### **Database of Community Contacts**

The Ombudsman's Act charges the Advisory Council to advise the Ombudsman on "The development of mechanisms for **registration of common interest communities** within the State or other political subdivision.

We receive many inquiries asking who an owner can contact in a community. We often facilitate the request by providing information from the Division of Corporations Annual Franchise Tax Report, which requires identification of directors.

The Division of Corporations has data that might allow registration of common interest community contacts and requires annual updating. Annual Franchise Tax Reports contain all the information for registration, including a database with mail or email contact of virtually all Delaware common interest communities. Because the only format available is an image-only, individually downloadable PDFs, it is not practical to create an annual electronic database with the existing system.

For the time being, the Ombudsman uses its access to the Corporation's search database to search and save individual Annual Franchise Tax Reports. We have collected Franchise Tax Reports on less than 1/10<sup>th</sup> of the estimated 3000 common interest communities in Delaware and are unable to keep the records updated on a rolling basis. We are exploring ways to work with the Division of Corporations to allow the annual franchise tax reports to be used as a form of registration for common interest communities. Some states have similar setups and avoid the need for separate agencies to manage community registration. Legislation with appropriate funding may be necessary to accomplish this goal.

## Special Projects:

- **Recording Bylaws and Amendments**

Since the 2009 enactment of the DUCIOA, all communities, large, small, and even exempt from other parts of DUCIOA, must have and record bylaws and amendments. In 2017, the Ombudsman worked with the New Castle County Recorder of Deeds on recommended forms for finalizing **recording of bylaws or amendments**. Case law is clear: boards must amend bylaws according to their stated requirements, or the amendments and the actions taken according to them may be void or voidable. Some communities never recorded their bylaws, or amendments. Changes to State law in 2016 law permit County Recorders to waive recording fees for community association documents. The State waives its portion of recording fees when the county does. To date, only New Castle County records community association documents without charge. In 2017 the Ombudsman met with Kent and Sussex officials to encourage use of this new statute as a community service. These efforts were delayed by the pandemic, but the Ombudsperson hopes to move them forward in the coming year.

In 2021, Advisory Council began work on a project to create and maintain model bylaws, in plain-English. One goal of the project is to continually update the model bylaws to keep them up to date with changes in statutes and case law.

- **“Collecting Delinquent Assessments”**

In 2018, the Ombudsman and the Advisory Council completed work on our so-called “Cookbook for Collections” project, which resulted in a guide to **“Collecting Delinquent Assessments”** using Justice of the Peace Court Personal-Debt Lawsuits without a lawyer. Advisory Council completed the Guide, aimed at self-managed communities, in early 2018.

In 2021 Advisory Council returned to updating of the Guide. The update was necessitated by Justice of the Peace Court’s update of critical court forms. At the roll-out of the updated Guide in 2022, we anticipate conducting a new round Collection Workshops like what was done after the initial rollout of the Guide. These new workshops will be recorded for the Website. The timing of this update is fortuitous, because the Ombudsman has identified communities with boards that made no effort to collect delinquent assessments, and the number of delinquent owners statewide refusing to pay assessment is growing, sometimes by double digits. We are scheduling a virtual presentation based on the results of our investigation to demonstrate the need to elect a board what will pay attention to this fiduciary duty, so all community members bear a fair share of the expenses of maintaining a community.

## Investigations

As in prior years, in 2021 the Ombudsperson received complaints that raised red flags for theft of HOA Funds. The Ombudsman issued subpoenas for bank and Association records for two

communities, adding those to the list of communities already under investigation. The records disclosed unjustified expenditures. Our financial investigator was able to quickly review the records and confirm the need for further investigation. The matters were referred to the White-Collar Crime Unit for final investigation, case preparation, and prosecution.

## **Final Thoughts**

At the link for “Sign-up for Our Email List,” I hope you will sign-up to receive email notices of Advisory Council meetings, legislative changes, and educational opportunities such as the “Board Leadership Workshops” or review the guide to “Collecting Delinquent Assessments.” We expect to again offer presentations in each county in 2022 and send reminders of these events with reminders of such things as the due date for filing Annual Franchise Tax Report forms using our email list. The email list also provides a direct contact to the Office of the Ombudsman to ask a question, suggest a topic for a presentation, or suggest a change to legislation.

Please look over our new and existing web content. You will find direct links to many publications of the Community Associations Institute (CAI), including its recently updated book [\*“Community Association Living, an Essential Guide for Homeowner Leaders.”\*](#) and to CAI’s Foundation’s “Best Practices Reports” on important topics, available free. The newest [\*“Best Practices Report-Transition from Developer Control”\*](#) is an excellent addition. There are links to many free and fee-only video programs, that answer many questions otherwise presented at Pre-Pandemic live meetings.

Christopher J. Curtin

Deputy Attorney General  
Common Interest Community Ombudsman

# Annual Report

## INQUIRIES AND COMPLAINTS HANDLED BY THE OFFICE

The Ombudsperson Act requires the Ombudsman:

*“To contact declarants, common interest community associations, the executive board of a ... community association, unit owners ... and other interested parties to inform them of the services available through the Office.” 29 Del. C. §2544 (1)*

The Office fields many inquiry calls and emails and formal complaints, every day. In 2021 we received or responded to 13,000 emails between our Paralegal (7000), and the Ombudsperson (6000). The Office offers ADR in nearly every post-IDR review. Sometimes the parties agree to ADR before review is requested or complete.

### Complaints

In 2021:

- We received 57 new, formal written complaints,
- We resolved 41 formal written complaints.
- We did not provide arbitration or mediation.

The Act explains that:

- The Ombudsperson is not the attorney for declarants, common interest community associations, the executive board of a common interest community association, unit owners in common interest communities, or other interested parties.
- No attorney-client relationship is implied or established by the Ombudsperson's communication with any persons, and
- The Ombudsperson may not act as, or appear to act as an attorney in a legal action brought by any person.

29 Del. C. §2544 (2).

The Ombudsperson's duty is to provide neutral service in mediation, arbitration or other Alternative Dispute Resolution, and investigations. The Ombudsperson must refer matters to other divisions or agencies where appropriate.



In 2021:

- We referred 3 to the Court of Common Pleas Community Mediation program which resolved them without charge to the parties.
- We referred 2 matters to the Consumer Protection Unit.
- We referred 2 matters to the White-collar Crime Unit.

### **Inquiries**

Inquiries come in through telephone, email, and “Contact & Complaint” forms. The Ombudsman took hundreds of calls in 2021. Our indomitable paralegal assistant handled hundreds more. The Office receives most “Inquiries” seeking information by email. Many Inquiries required a review of governing documents or the DUCIOA prior to response. Sometimes the General Corporation Law or *Robert’s Rules of Order* answer a question. Sometimes the complaint requires the assistance of a private community association lawyer.

We offer what we can, but cannot offer legal representation, or legal interpretation, legal advice, or legal recommendation of what is in the best interest of the inquirer or their community. We do try to “assist... interested parties in understanding their rights and responsibilities and the processes available to them according to the law, regulations and documents governing their respective common interest community association.” 29 *Del. C.* §2544(2).

### **Email Inquiries**

We try to get information back to the inquirer within 24 hours. Most often, we must inform the inquirer that an issue must first go through the IDR process before the Act permits the Office to review the matter. 29 *Del. C.* § 2544 (9). While some seek only general information, others may require a private attorney.

In 2021 we:

- received and resolved 126 informal complaints.
- received and resolved 213 Inquiries.

Often, we counsel complainants to complete the statutory requirements that trigger our review.

We continue to hear from many that the IDR process resolved complaints, with no more contact with the Office than reviewing the website. In 2019 through 2021 we have actively encouraged boards and owners to try “Meet and Confer” as it is more successful than adversarial “Board Hearings” and even mediation.

### **Post-IDR Complaints for “Review”**

Some HOA boards do not respond to complainants using the IDR process. The Office accepts those as Complaints if there is no response in 20 days after delivery of the complaint to the board. Prior to the Pandemic, respondent boards refused to respond to our Office, or

responded by declining Alternative Dispute Resolution. This continued in 2021, with few boards or declarants agreeing to mediation and none agreeing to arbitration, though that is the most often requested ADR by owner complainants, especially binding arbitration.

Several complaints involved HOA boards not following their bylaws on a variety of subjects including:

- Election or other procedures, amending bylaws, notice of meetings, open meetings...
- Budget requirements, Reserve limits,
- Access to financial and other books and records.

Others are more complex and require involvement of County governments about systemic problems, e.g., release of contractors' bonds without adequate compliance to the plat, even violations of Fair Housing Acts' accessibility requirements for sidewalks and driveways.

Several Boards did not respond to the IDR. Others ignored the Ombudsman's request for the board's position. Sometimes the Ombudsman's inquiry apparently caused compliance with the bylaws, or resignation of an officer or director, or return of books and records after elections.

In appropriate cases, the Office issues subpoenas to an association or a bank, especially if circumstances suggest possible theft of funds. Several complaints were withdrawn after the Office requested information.

***Received:*** *Our back log is shrinking, due to some new processes:*

1. We entered 2021 with 164 open matters.
2. We opened 24 new matters
3. We resolved 41 matters
4. We ended 2021 with 147 open matters

***Resolved:*** Of the 147 open matters at the end of 2021, 110 involved 4 "Master Complaints," where numerous owners in a community submitted individual complaints. In one such Master complaint, 101 individual complaints will be closed in 2022 as final aspects of the matter are resolved.

### **Alternative Dispute Resolution**

**Mediation:** Most complainants still request *binding arbitration*, but the opposing party always refuses. We always ask if the parties will participate in ADR through the Ombudsman's Office. If they are unwilling to do so we recommend ADR through other programs, most of which are free.

In 2021, complainants requested referral to the Court of Common Pleas' "Community Mediation Program," which is free but only if referred only from law enforcement agencies. The Office made 5 referrals. Three reached final agreements. This Office also referred two complaints to the State Human Relations Commission. Each was a case involving apparent

bias or discrimination. We referred two each to the Insurance Commissioner and Consumer Protection Unit.

**Binding Arbitration:** Most complainants continue to request binding arbitration, but the board or declarants consistently refuse. There were no binding arbitrations in 2021.

**Board Initiated ADR:** The Office did not receive any board-initiated ADR in 2021.

## EDUCATION AND OUTREACH EFFORTS

The Act requires the Ombudsperson:

*“To organize and conduct meetings to educate declarants, ... community associations, the executive board of a ... community association, unit owners ...and other interested parties about their rights and responsibilities and the processes available to them according to the law, regulations, and documents governing their respective common interest community.” 29 Del. C. § 2544 (3)*

Despite the Pandemic, the Office continues to receive requests for a presentation by the Ombudsman, or to join the mailing list. We also receive requests from State and County legislators to meet or to video conference with communities. If a community has specific concerns that may require more preparation or review, a community can request a presentation using the “**Contact & Complaint**” form and include information specific to the community, including copies of its governing documents. The form is available, and “fill-able” on the Website.

### Education Efforts

In 2021, the Ombudsperson made presentations to 20 communities, and 8 Advisory Council and Committee meetings, including remote meetings, and 2 workshop presentations, One on “Governance” and one “Board Leadership Development.” For comparison, in 2019 the Ombudsman attended 32 meetings and 4 presentations respectively.

Presentations cover a variety of topics including:

- The need to adhere to governing documents.
- The DUCIOA’s requirement that all communities, even if exempt, to record their bylaws.
- The reason for and importance of honoring quorums.
- The right of access to HOA documents including financial information, books and records.
- The importance of proper accounting and fiscal procedures for protection of the homeowners’ association money.
- The rules and procedures for running effective meetings.
- The ability of an association to use Justice of the Peace Court “Debt Actions,” without an attorney, to recover unpaid assessments as a supplement to liens.

The Ombudsman has made presentations to groups as small as four board members, to umbrella and other groups, some with 250 attendees, until the Pandemic. While in-person events are returning, the efficiency and convenience of remote presentations (for both the Ombudsperson and homeowners) will likely cause remote presentations to be a permanent part of the Office’s offerings moving forward.

Besides Advisory Council and Committee meetings, in 2021, the Ombudsperson met with or conferred with Chancery Court administration; county government representatives (New Castle, Kent, and Sussex); citizens and legislative committees (Delaware Legislative Counsel, New Castle County Council), State Legislators, and agencies (DNREC) to discuss issues affecting common interest communities and areas of mutual interest addressed by services offered by the Office. The Office and the Advisory Council also monitored the National Conference of Commissioners on Uniform State Laws deliberation on amending the UCIOA.

### **Public Workshops:**

#### **Joint CAI Board Leadership Development Workshop**

In 2021, we once again provided CAI's "*Board Leadership Development Workshop*" jointly with CAI's Keystone Chapter, but for the first time, as a virtual, online presentation, because of Pandemic restrictions. Until October 2019, the Ombudsman and CAI's Keystone Chapter (which covers New Castle County) continued the series as live presentations of jointly offered *Workshops* aimed at board and association members, for a basic understanding of the documents creating common interest communities and basics such as collections of assessments and enforcing community bylaws and restrictions. In 2021, it was divided into two virtual sessions of 3 hours each over 2 days.

In 2021, the Education committee continued the well-received "homegrown" version of its "Governance" workshop as a virtual and recorded presentation. A recording is available on our website to a link to the Keystone CAI website.

#### **"Collecting Delinquent Assessments" Without a Lawyer- Workshops**

Collection of delinquent annual assessments continues to be a topic of high interest to HOA and condominium residents, throughout the State. The Advisory Council prepared a Best Practices "Cookbook" style guide, which will be updated in 2022 to agree with Court forms revised by the Court shortly after the Guide was completed. The Guide is being updated to prepare for a new round of this workshop in 2023.

### **Outreach Efforts**

The Outreach efforts included email and direct mail to a growing database of common interest communities, offering to make presentations, making presentations outside the Office when requested, providing information to legislators and the Department of Justice to disseminate, and encouraging members of the Advisory Council to notify their association members to spread information about the Office, its services, and website. We ask several legislators to contact their constituents about our programs, as they get the greatest response of all. During 2021, the email list grew from 320 individuals to over 700, all of whom receive periodic email invitations to Advisory Council meetings, workshops, the Annual Board leadership development workshop, and CAI chapter events. Attendance at Advisory Council meetings has grown considerably with the emailed announcements and speaker announcements.

## **Information Gathering**

The Act requires the Ombudsperson “*To organize and hold public meetings as necessary to gain a comprehensive sense of the issues facing common interest communities in the state.*” 29 Del. C. §2544 (17) and to report the concerns expressed by members of common interest communities to the Office. 29 Del. C. §2544 (16) c.

Each meeting, including all in 2021 reserves time for public comment. The Ombudsman asks for comments concerning issues confronting communities at each presentation, workshop, and Council meeting. In addition, owners, board members and other interested parties email or call with concerns every day. The public is also invited to ask questions and express concerns at each Advisory Council meeting, and they do.

### **Video**

In 2021 the Advisory Council Education Committee decided to record some live Workshop presentations for posting on the website so that they would be available at any time. Our CAI Members provide experience and materials to help us learn the ropes of live and recorded presentations. The Keystone Chapter of CAI provided “back office” support to record and post the recordings, which are without charge for homeowner viewing. We are especially grateful for this generosity.

### **Email**

Nearly every response to an email seeking information includes a link to the Ombudsperson’s Website. In 2021 we adopted “long email signatures” with detailed information about the Office, its duties and limitations, the Dispute Resolution Processes focusing on the “IDR” (“Internal Dispute Resolution”) Process. A second “long closing,” adds information and links to information about “Transition” from developer control to owner control of the community. The Office emails fliers to its mailing list announcing the “Board Leadership Development Workshop” and other workshops and presentations. Since the implementation of remote meetings, we add a Zoom link for Advisory Council meetings to those on our email list. These notices include the order of business and note the time set aside for public comment.

The Office does not have a complete database of contacts for homeowners’ associations for each county. Kent and New Castle Counties have databases, based on storm water management records or manual searching, but both are incomplete, and they do not include the 57 municipalities in Delaware. Sussex County does not have a similar database, but members of the Advisory Council continue to provide contact information for many Sussex County common interest communities and property managers.

The Ombudsman is interested in working with the Division of Corporations, to explore a more comprehensive database using Annual Franchise Tax Reports, but the project is fraught with issues. The sources are incomplete, but the combined databases should eventually

complement each other. The Office used our limited, email database to announce the CAI Leadership Workshop, and other educational opportunities.

### **Mail and Print**

The Office emailed flyers to those in the database announcing the Board Leadership Development Workshop and providing information about the Office and the Website.

## CONCERNS EXPRESSED TO THE OMBUDSMAN

The Act requires the Ombudsperson “*To organize and hold public meetings as necessary to gain a comprehensive sense of the issues facing common interest communities in the state.* 29 Del. C. §2544 (17) and to report the concerns expressed by members of common interest communities to the Office. 29 Del. C. §2544 (16) c.

The Ombudsman made 20 presentations in 2021 and conducted question-and-answer sessions to answer community questions and hear the concerns in each county. Several legislators, and county officials participated in public meetings to discuss issues and services affecting each county.

In 2021, members of common interest communities expressed many of the same concerns to the Office of the Ombudsperson as previously reported. The Internal Dispute Resolution Process continues to resolve most issues and concerns. More communities are accepting the recommendation to try less formal “Meet and Confer” procedures in lieu of formal board or multi-member committee hearings. “Meet and Confer” continues to be less confrontational and less divisive when those with calm demeanor represent the board. Although not always immediately successful, some “meet and confer” discussions lead to agreements in mediation and other ADR.

Among the prevalent concerns expressed in 2021 were:

### 2021

- **Denial of access to community books and records.** Both boards and community management companies are reported as denying owners access to community “books and records” or placing inappropriate obstacles in the owners’ path to such access. The requested information is usually financial information about assessments and their expenditure. As in prior years, this is the most common complaint received by the Ombudspersons Office.
- **Board failure to conduct timely, annual board elections or in compliance with governing documents.** This is again one of the top two complaints received in the Ombudspersons Office.
- **Incivility by or to board members and some association managers toward owners.** The Ombudspersons office continues to recommend discussion and adherence to [CAI’s Civility Pledge](#).
- **Board non-compliance with governing documents.** This leads to board actions that are “void or voidable,” as declared in several Chancery a Court opinions, including [Adams v. Calvarese Farms Maintenance Corporation](#), C.A. No. 4262-VCP (Del. Ch. September 17, 2010), which includes explanation of the cure: The community conducts proper elections, and the new, properly elected board reviews, reconsiders, rejects or ratifies each action by the improperly acting or improperly constituted board.



- **Multiple owners complained that developers charged assessments for unbuilt or incomplete and therefore unusable amenities**, in violation of [25 Del. C. §317](#). Sometimes, the violations were corrected by the developer, while several others are still being investigated as directed in section 317.
- **A Recorder of Deeds properly declined to record amended bylaws that lacked any acknowledgement of approval by the members, or other verification and acknowledgment.**

### **Pandemic Related Concerns:**

- Owners objected to paying assessment for amenities that remain closed, like pools, clubhouses, and meeting spaces that they can't use, or can't afford having lost their jobs. CAI publications explain there are maintenance costs that remain, and sanitation necessitated by the Pandemic. These avoid greater expense post-pandemic.
- Owner objected to other owners who refused to wear protective masks while in common areas, despite the Gubernatorial Executive Order (which allows police enforcement).

### **Handicapped Parking Spaces**

- Two communities complained seeking a specific number of handicapped person parking spaces required by Federal law, (number depends on circumstances), or how many must be reserved under Fair Housing Act Rules. (Depends upon requests of affected persons.)

### **DUCIOA Concerns**

- An Owner sought enforcement of DUCIOA to a condominium outside Delaware. (Sec. 81-123 limits application of DUCIOA to real estate in Delaware.)
- An owner complained that HOA was fining for a tall flagpole approved by the County in a pre-DUCIOA, 1970's, community.
- Community members *who stopped attending* board or association meetings complained of incivility going toward and from the board. The discussion moved from contentious issues to "civility and communication" before noticed issues were discussed. We circulated the CAI "Civility Pledge" to attendees at our last "Governance" workshops.

- One community sought detailed instructions interpreting “reasonable restrictions” language in the “Solar Panels Law,” 25 *Del. C.* § 318, amended in 2019. None existed, but Legislative Counsel prepared a page that simplifies some aspects.
- Owners requested how to terminate an HOA. The DUCIOA at § 81-218 has 3 complex pages on the topic.

#### Additional Examples of Concerns

- Owners objected to political flags, and United States flags authorized by DUCIOA, declarations and 25 *Del. C.* § 316, “Display of Flags.”
- Two complaints by owners about racial and other bias based discrimination by other owners were referred to the Division of Human Relations.
- Owners inquired about recommendations for Association management companies. We cannot provide recommendations for specific companies. Several complaints suggested the need for licensing, like Connecticut’s requiring basic qualifications such as education and experience, certification by a national testing organization, background checks and bonding requirements.
- An Owner sought enforcement of DUCIOA to a condominium outside the United States. (§ 81-123 limits application of DUCIOA to real estate in Delaware.)
- Owners objected to the length of the period of declarant control, particularly to the extended time permitted in Master Planned Communities, under § 81-223 (g).
- Creation of a *Civic* Associations was sought by a community with no HOA. We supplied information available.
- Owners complained about board approval of speed bumps for a sum greater than allowed in documents without community approval.
- Owners complained that their treasurer, who was convicted of stealing \$30,000 from the community, was only ordered to pay \$23/month in restitution despite promising to make restitution payments from his retirement account. At this rate it will take over 100 years to fully repay the amount stolen. Policy discussions about better ways to deter theft and encourage restitution (e.g., brief incarceration and higher restitution payments) may be necessary to address these problems. The Ombudsman routinely recommends fidelity bonds for those handling monies for even small communities.
- A board member reported that Realtors pressure the board to fill out “Resale Certificates” showing only a partial sum for Annual Assessments with specific mandatory components. The language of DUCIOA § 81-409 appears to require disclosing the full amount of all mandatory payments. The Consumer Fraud Act may

require full disclosure as well. Developers make a similar argument by separating assessment for road maintenance and separate mandatory maintenance, such as community landscaping.

- An Owner complained that the Association did not strike a lien from her record as paid. Failing to satisfy a judgment may result in penalties under 10 *Del. C.* § 4751 of \$500, and damages under § 4754 of \$500. The Ombudsman cannot order marking paid or removal of liens.

## Concerns of Homeowners

- **Transition.** Another universal concern is the lack of specific requirements or information or training of community members for “Transition” from developer to homeowner control of an Association. All counties inspect for compliance with the plat plans and building ordinances. But owners complain that the inspectors miss items like plantings noted on the plat, replacing dead trees and shrubs, a building that violates the declarations, or undisclosed underground storm drains.
- The DUCIOA requires post-2009 communities to have unit owners on the board during Declarant control. This produces homeowners better equipped to take control of their homeowner’s association. A good transition involves working homeowners onto the board and committees as training.
- Many boards are adrift, not knowing how to operate a successful nonprofit, nonstock corporation, or association. They report that at transition, the developer only dropped off a set of keys, and there was no effort to introduce the new board to its duties and responsibilities.
  - Problems that result range from failure to file Annual Franchise Tax Returns and Federal forms to poor financial controls such as a treasurer having blank checks signed or balancing the bank statement without oversight. In some communities, this resulted in significant theft of homeowners’ funds.
  - A few states require elected owners to attend training in HOA operations to serve on the board. Delaware offers an annual Joint CAI and Ombudsperson “Board Leadership Development Workshop.”
- **Refusal of Audits.** Communities report declarants’ refuse to seek or produce reports of audits during and after declarant control or provide audits that do not conform to DUCIOA requirements. The Ombudsman circulated a GAAS statement of requirements by an auditors’ professional association, detailing the requirements for one of the specific DUCIOA transition audits. [25 Del. C. 81-303 \(g\)](#).
- **Owner or Member Apathy.** Community apathy resulting in lack of quorum for elections or voting on issues continues to be persistent. The Ombudsman discusses various

strategies for increasing community participation at presentations and workshops and in many emails. The Office added links to Community Associations Institute's "Best Practices" reports on its website. These reports provide discussion and useful checklists and sample documents for several important issues that associations face, including "Governance," and building community spirit. The Ombudsman arranged for CAI to place its "library of publications" in one public library in each county. The State Librarian catalogued them on its website and, on request, will transfer a publication to any public library in the State. The Ombudsman detailed several other CAI booklets on its website. Many are available at no cost at the CAI websites.

- **Skills for Running Meetings.** Lack of knowledge of proper procedure for running meetings is a persistent obstacle to proper operation of homeowners' associations. All our Board Leadership Development Workshops cover basic parliamentary procedure. The Office also includes simplified Roberts Rules of Order publications on our website. Several Advisory Council members are experienced in procedure, including one parliamentarian, who explains proper procedures to groups. The Ombudsman distributes booklets on "How to Have a Successful Meeting" and "The A-B-Cs of Parliamentary Procure" when they may be helpful.
- **Failure to Comply with or Adhere to Bylaws.** This continues among the most common and serious complaints received from owners and even board members. Complaints usually result from failure of the homeowner or the Board to read governing documents. Specific complaints include:

Elections:

- The Board fails to use the mandatory Nominating Committee, or Election Committee, and fails to solicit new board members, or creates obstacles to stay "entrenched."
- The Board fails to follow Notice requirements.
- The Board fails to follow quorum requirements.
- The Board fails to use proxies, when authorized
- The Board changes directors' terms of office, making them conflict with the bylaws, without changing the bylaws.
- The Board fails to provide proper ballots or proxies as stated in the bylaws.

Bylaw enforcement:

- The Board or president changes the bylaws at will, without a required vote of the board or members and without recording the bylaws or amendments.
- The Board enforces restrictions and bylaws selectively against owners while Board members violate the same bylaws.

- In two troubled communities, the board discriminated against individuals, and harassed, bullied, and even defamed individual owners. (Offers to mediate or arbitrate were refused by each board.)
- The Board, without authority, waives payment of assessments for board members who provide services to the association such as grass cutting or awarding a contract for grass cutting to a board member or relative without offering the community the same opportunity or following tax requirements or governing documents.
- The Board extends the use of assessments beyond the authority in the bylaws. For example:
  - The Board spends or budgets funds for Community Events while bylaws limit expenditures to maintenance of common areas and expressly describe the procedure for extending the use of the assessments by vote of the owners.
  - The Board takes on responsibility for infrastructure expenses in a neighboring community without Association approval.
- The Board inconsistently applies standards for fences and other architectural features.
- The Board refuses to make reasonable accommodations under the Fair Housing Act to accommodate disabilities. The [State Human Relations Commission](#) enforces the Act.
- The Board fails to keep minutes of board or Association meetings or fails to provide them on request of an owner.
- The Board fails to arrange audit of Association finances required in the bylaws.
- **Response to Records Requests.**
  - Unprofessional and obstructive responses to requests for access to or copies of documents made to management companies and boards.
  - Lack of transparency and lack of response to requests for access to documents and other information by owners of damaged property.
  - Obstructive interpretation of a “proper purpose” for requesting association records.
- **Refusal to Resolve Owner Complaints Internally.** The Ombudsperson’s Act requires all communities to have a written “Internal Dispute Resolution” (IDR) procedure, or to use the one created by the Ombudsperson according to the Act. Only one community offered a pre-existing IDR process that a homeowner could use for a complaint about the Board. Many bylaws permit a Board to complain informally against a homeowner. Homeowners report refusal of Internal Dispute Resolution for such matters as:
  - Requests for access to Association records.
  - Complaints about violation of bylaws about election procedures.

- Discriminatory enforcement of rules and Architectural Review standards.
- Owners complain that boards deny basic due process requirements of notice and opportunity to be heard or to present evidence, though required by bylaws or rules.
- **Raising Assessments and Failing to Raise Assessments.** Homeowners report complaints about mandatory annual assessments, including:
  - Disputes over including expenses of social events in assessments.
  - Disputes over what is a “capital improvement.”
  - Disputes over what is a “common area” or a “limited common area.”
  - Disputes over what the “Reserve Funds” covers.
  - Disputes over the need for a reserve fund for “Contingencies” separate from a “Repair and Replace” or a reserve exclusively for “capital expenses.”
  - Disputes over funding for the “Reserve Funds.”
  - Failure of the Board to collect delinquent assessments from owners.
  - Collecting delinquent accounts costs more than is recovered.
  - Failure of the Board to collect, inciting others to refuse to pay.
  - Failure to use Personal-Debt lawsuits in Justice of the Peace Court without a lawyer.
  - Charging fines or fines too high, or higher than authorized for late payment or rule violations.
  - Refusing to consider unusual circumstances such as loss of a job, or hospitalization for illness or injury justifying a payment plan.
  - Charging the wrong interest rate, and sometimes the full annual interest rates *each month*, or charging interest on penalties.
- **Failure to Make Board Meetings Open to Association Members.** The DUCIOA requires some boards to hold “open meetings.” 25 *Del. C.* § 81-308A. Where not required, if a community’s documents are silent, the DUCIOA may fill in the blanks. See, § 81-119. Some Boards exclude Association members who are not directors for various reasons, including:
  - The Board claims incorrectly that a meeting of the Executive Board is an “executive session” that is closed to the owners.
  - Some Boards hold meetings in a resident’s house and exclude other owners.
  - Some Boards do not allow comments from other owners during Board meetings.

- **Failure to Use Roberts Rules When Required in Bylaws.** Not every Association must adhere to Roberts Rules of Order. Even when they do, owners report:
  - No agenda.
  - No prior meeting minutes for approval in advance.
  - No Quorum.
  - No minutes taken, or minutes recording every conversation instead of every action.
- **Exemption from DUCIOA Where Annual Assessments < \$734.27 (after 7/1/22).** Owners, boards, and communities with annual assessments lower than \$734.27 (after July 1, 2022) complained that adopting the DUCIOA, with its provisions to impose statutory liens and other beneficial provisions, is prohibitively expensive. Other sections that owners report as desirable for exempt communities include:
  - 81-305: Termination of contracts and leases of declarant.
  - 81- 308A: Executive board meetings, requiring open meetings.
  - 81-309 (f): Ballots without meetings.
  - 81-316: Liens and priority for HOA liens for assessments.
  - 81-419 (a): Declarant's obligation to complete amenities identified in the plat unless labeled "Need Not Be Built."
  - 81-421: Amendment of public offering statements after purchase.
- **Unduly Restrictive Architectural Review Committees:**
  - Denial of applications for solar panels because unaware of statutes permitting solar panels despite restrictive covenants. 25 *Del. C.* § 318.
  - Denial of fences though many exist in the community and singling out residents for enforcement.
  - Allowing or refusing allowed plantings in stormwater control ponds and swales.
  - Denial of requested changes for "reasonable accommodation" under the Americans with Disabilities Act.
  - Refusal of political signs, solar panels, and flags, contrary to State and Federal law.
- **Entrenched Boards.** Problems reported include:
  - "Autocratic" rule
  - lack of civility.
  - personality clashes.
  - ejecting residents for asking the board questions about finances.

- threatening to call police if questioners do not leave.
  - and calling police on pretext about people who ask questions at board meetings.
  - refusal to permit members attend board meetings.
  - failure to adhere to bylaws on elections.
  - use of funds without a required member vote.
  - changing bylaws without a required member vote.
  - conflict of interest through self-dealing on community expenditures.
  - Several outgoing treasurers refused to return corporate books, financial records, and instruments to the corporate association that owns them.
- **Failure to Provide Notice of Filing Liens to Collect Unpaid Assessments.**
    - Owners report instances when they were not delinquent but had to hire attorneys to save their homes from foreclosure.
    - Absentee owners reported they did not receive notice mailed to their unit since they live out of State, and the Association charged penalties and fees.
    - Owners were not notified that the Board filed liens against their property.
- **Declarants Amend Declaration after Sale of Units to Homeowners**
    - Extending the period of declarant control.
    - Delaying declarant contribution to assessments contrary to bylaws in effect during sale to homeowners.
    - Declarants eliminating advertised amenities after the sale, usually after sale of the development or after bankruptcy.
- **Failure of the Developer to Build Amenities Due to:**
    - Economic downturn
    - Bankruptcy
    - Sale of the development to third parties because of either of the above
    - Delay in construction due to economic downturn-sometimes increasing the percentage sold for completion of amenities from 75% to 100%.
- **Road Issues: Owners Report several Significant Issues:**
    - Dedication to public use for State maintenance: Sussex County does not require developers to build private roads to State specifications so they cannot be dedicated to public use and fail earlier than expected at association expense. Owners face high assessments for road restoration.
    - Developers do not disclose the lower standards, so sale prices and assessments are artificially low.
    - Declarant/developer failure to complete roads.
    - County released bonds for unfinished or roads not to specification.



- **Lack of Communication and Transparency After Catastrophic Loss.** Communities report disregard of requests for access to financial records and other information from the Board after a casualty loss, especially where insurance is exhausted, or claims include uninsured betterment.
- **Misunderstanding of Application of DUCIOA to a Community or an Issue.** There is widespread lack of awareness of and understanding of the applicability of a portion of DUCIOA to preexisting communities, as detailed in 25 *Del. C.* § 81-119.
- **Theft of Association Funds by Association Treasurer.** Communities report potential financial red flags, such as boards not filing Annual Franchise Tax Reports and not filing Non-profit, informational tax returns, or delivering checks signed in blank to the treasurer, refusal of access to books and records, especially account records. We issue subpoenas in several instances every year. One cleared a treasurer of all wrongdoing; others resulted in the arrest, indictment and conviction of directors for theft and conspiracy, while others are still under investigation.

### Concerns of Boards

- **Collecting Delinquent Assessments.** This is among the most common complaints received from Boards, which are frustrated that filing a lien against the property does not translate to collection of the delinquent assessments until sale of the property. Most found collecting on a lien through foreclosure prohibitively expensive and ineffective. Board members complain about:
  - Expense of lawyers eliminates recovery. (Though most declarations authorize recovery of lawyers' fees from the delinquent owner.)
  - No mechanism for determining a person's employer for wage garnishment. One complainant wants the judicial system to provide the information.
  - Exclusion from DUCIOA for communities with less than \$734.27 annual assessment (2022) denies them "super-priority" liens.
  - Boards open bank accounts and sue without knowing the proper name of the HOA, impeding the Association's ability to collect or protect officers from liability.
  - Boards can have New Castle or Kent County bill and collect assessment payments, but counties do not bill for late fees or penalties, nor undertake collection. Sometimes payment to the county is timely but the association gets the county's distribution of funds on the county's schedule. This can make timely payments seem late to the Association. Debt collectors seldom check this.
  - Third party Debt Collectors often violate the Fair Debt Collection Practices Act.
  - Debt Collectors sue on assessments barred by the statute of limitations.

- **Enforcing Rules.** A few communities seeking to enforce rules, when faced with Owner refusal, asked the Ombudsman to offer ADR to the homeowner, instead of going directly to County Code Enforcement or to court. Complaints included:
  - Parking unlicensed or disabled vehicles in driveways or the street.
  - Parking business or trade vehicles with business advertising in the community.
  - Operating a business in the community in violation of zoning or deed restrictions.
  - Fence disputes when the fence complies with county rules, but not deed restrictions.
  - Parking oversized vehicles like recreational vehicles for longer than permitted.
  - Parking boats on the property.

Usually County and Municipal code enforcers are effective and should be used first. To date, no offers resulted in ADR or complaints after IDR.

- **Failure of the Developer to Prepare Owners for Transition from Declarant Control.** Inadequate preparation of homeowners for transition to homeowner control and operation by the homeowners' association is a significant problem. Volunteer non-lawyer boards are often ill equipped to manage the work of the Association. This is evident from the number of boards failing to file information returns to maintain corporate or non-profit status, poor accounting and financial controls and oversight, and lack of awareness of the need to adhere to the bylaws and other restrictions. Better developer/declarants create committees and homeowner involvement on the board, as training to familiarize homeowners with their future responsibilities. Some developers pay for board members to obtain training. Boards can do that. Better transitions result in better communities, and better reputations for the community and the developer.
- **Declarants Understating the Estimated Assessments and the Costs of Operating the Community.** There are concerns that some developers understate the assessments to promote sales of homes. Lower assessments make the community appear more desirable compared to other communities with similar amenities. Purchasers do not know the true costs to justify the assessments until after Transition.
- **Transition Audit issues.** Complaints allege the Developer did not comply with DUCIOA's Transition an "audit of all expenditures made with funds collected from unit owners not affiliated with the declarant together with a list of all items paid for out of association funds that specifically benefited only the units owned by declarant and not the units generally. The audit shall be conducted by a certified public accountant that is not an affiliate of declarant." Some "audit" letters provided were not prepared by a Certified Public Accountant not affiliated with the developer. 25 Del. C. § 81-303(g). Others did not rely on Generally Accepted Audit Standards. (GAAS.)
- **Difficult Homeowners.** Many Boards express frustration with a few homeowners who challenge everything the Board does, in ways that not only increase frustration, but also

increase the expense to the entire community by requiring an attorney to review all requests from these individuals. Problems mentioned include:

- Threatening suit that would interfere with negotiations bearing on Transition.
- Document requests that are voluminous and stated to make it difficult to know what the requestor wants.
- Angry homeowners, who shout and disrupt meetings with demands or questions about matters not on the agenda.
- Statements implying that an owner intends to bring a weapon to a meeting.
- Statements that one can interpret as death threats.

### **Concerns of Board Members.**

Individual members of Boards also have concerns about how the Board is operating. Occasionally a director or officer will discuss filing an internal dispute resolution complaint with the board. Some officers or directors have resigned when confronted with their own violations of bylaws and common business procedures.

- **Failure of the Board President to Follow Bylaws for Elections, Expenditures, and Other Matters Involving Community Funds.**
- **Failure of the Board President to Report Financial and Other Important Data to the Board including:**
  - Notice from IRS of failure to file multiple years of nonprofit corporation status reports.
  - Failure to share financial reports with board members for months at a time.
  - Discontinuing board meetings.
  - Discontinuing member meetings.
  - Discontinuing election of directors.
- **Refusal of Prior Board Member to Turn over Books and Records to Newly Elected Board, including:**
  - The financial account records and checkbooks.
  - Other financial documents.
  - Governing documents.
- **Residents carrying Firearms in the Common Areas despite Bylaws and Rules Prohibiting Firearms in the common areas.**

## Concerns of Declarants

- Few developers or declarants contact the Office of the Ombudsperson. However, representatives from the building community informed the Advisory Council of several concerns.
  - Concern that new legislation will over-regulate development of common interest communities.
  - Individuals or small groups of residents, who are not on the Board, disrupt the Transition process by trying to micromanage the community with constant complex demands for records, and threats of lawsuits, that threaten to derail transition processes.
  - Lack of standards for transition to homeowner management of the community.

## Concerns of Other Interested Parties

- **Inter-neighborhood disputes** over boundaries and liability for encroaching amenities. The Office of the Ombudsperson notifies parties to these disputes that the Office is available for dispute resolution.
- **Real Estate sales personnel complain to our Office that they sometimes can't find out if a community is a common interest community, or a property has a delinquency.** The Ombudsman's office is discussing with the real estate commission an educational workshop for real estate salespersons.

## LEGAL DEVELOPMENTS IMPACTING COMMON INTEREST COMMUNITIES

### LEGISLATION

#### DUCIOA “Clean-up” Bill HB 112

In 2020, just before the pandemic shut down almost all work unrelated to the Pandemic, the Common Interest Community Advisory Council completed its recommendation on an update to the DUCIOA to make corrections for clarity and a few non-controversial changes. As such, the draft legislation associated with this work was introduced by Rep. Kendra Johnson as HB 112, on January 12, 2021. The bill cleared both houses of the Legislature by March 9, 2021 and was signed by the Governor on September 15, 2021. The Bill, which Advisory Council dubbed the “DUCIOA ‘Clean-up’” bill became effective on October 15, 2021.

The detailed Synopsis explains the changes made to the DUCIOA. The changes have been added to the Ombudsman’s Website copy of the DUCIOA:

“This Act corrects several technical and typographic errors in the Delaware Common Interest Ownership Act (the “DUCIOA”) and makes a few non-controversial changes agreed upon by the Common Interest Community Advisory Council and representatives of builders, real estate sales professionals, association managers, and owners.

Section 1. ... amends Section 2246 [of the Unit Property Act] to correct the inadvertent omission of “not” in the Unit Property Act clarifying that exclusively nonresidential condominiums are not required to maintain a repair and replace reserve.

Section 2. ... amends Section 81-116(a) [of the DUCIOA] to clarify the original intent of the DUCIOA, which exempts nonresidential common interest communities.

Section 3. ... amends Section 81-119 by adding five sections of the DUCIOA to apply to pre-existing communities through section 81-119 as follows:

§81-217 (i): ... holders of security interest are *deemed* to have granted approval of amendments to the declaration if they do not refuse consent in writing after notice.

§81-306: Bylaws.

§81-308A: executive board meetings are open to members after the period of declarant control.

§81-310: voting proxies and voting by ballot without a meeting permitted.

§81-314: surplus funds remaining after payment of expenses and prepayment of reserves, returned to owners.

This section [81-119] also clarifies that a conflict between a preexisting document and DUCIOA in any common interest community is resolved in favor of the

preexisting documents, whereas the prior language specified application only to condominium and cooperatives.

Section 4. ... amends Section 81-217(i) to clarify a common ownership community's ability to amend its governing documents.

Section 5. ... amends Section 81-217(m) to add a new subsection which allows Declarants or the Council to correct typographical errors efficiently and easily, by deeming consent to amendments by security interest holders after notice. It follows the procedures in the DUCIOA for obtaining lenders' consent to actions and amendments to apply to existing common interest communities.

Section 6. ... amends Section 81-303(a) to clarify that under Delaware corporate law there is no distinction between the duties of a director or officer of a for-profit corporation and those of a director or officer of a non-profit corporation.

Section 7. ... amends Section 81-303(c) to allow termination of the period of declarant control as permitted in the declaration.

Section 8. ... amends Section 81-310(a) to expand the options and methods for owner voting.

Section 9. ... amends Section 81-316(h) to add language that allows a community to charge a reasonable fee to provide required certifications regarding the community and limits the liability of a voluntary association for inadvertent errors.

Section 10. ... amends Section 81-316(j)(1) to add a comma to correct a typographical error in the existing statute. It clarifies that mortgages can be foreclosed upon by law processes, equity processes, or as provided in the governing documents.

Section 11. ... amends Section 81-318(e) to add language that clarifies the right of the association to charge a fee, in advance, to the unit owner when the unit owner has requested conversion, inspection, or copying of association records.

Section 12. ...amends Section 81-324(a) to add language that clarifies that voting at a budget meeting may be by proxy and in person.

Section 13 ... amends Section 81-408(a). Currently, the DUCIOA limits the right to cancel for failure to supply a public offering statement to purchasers of condominiums and cooperatives. Changes to this section conform subsection (a) to UCIOA and clarify the date for cancellation of purchase contracts.

Section 14. ... amends Section 81-409(b) to limit the liability of the Association for inaccurate information provided by the property manager in fulfillment of the requirement to provide information to complete a resale certificate.

The Ombudsman's word-searchable and indexed website copy of the DUCIOA incorporates the amendments and supplies footnotes to the changes.

## Uniform Common Interest Ownership Act

In 2020 the National Conference of Commissioners on Uniform State Laws completed its review of the Uniform Common Interest Ownership Act (the “UCIOA”), which is the basis underlying the DUCIOA (the “Delaware Uniform Common Interest Ownership Act.”). In 2021, the National Conference approved the work of its Drafting Committee Commissioners, updating the UCIOA and the Uniform Condominium Act (UCA), the basis of the Delaware Unit Properties Act. Significant changes were approved for recommendation to the States.

A few of the significant changes recommended to the UCIOA include:

- Section 1-117: a “roadmap” of what sections of the UCIOA can be *varied* by the declaration or bylaws.
- Section 2-201: Proposes a significant change to the UCIOA’s and UCA’s *applicability* to both new and existing associations, by providing that pre-existing communities are subject to most provisions of the law. (This might be a basis for expanding the sections applicable to Delaware communities now limited to the 27 listed in 25 *Del. C.* § 81-119.) This is based on a new evaluation of the effect of interpretations of the U.S. Constitution’s “Contract Clause.”

The Ombudsman and several Advisory Council Members followed the debates and will provide the CIC Advisory Council’s Legislation Committee a copy of the approved report when it passes final review by the National Conference’s “Style Committee.”

## CASE DECISIONS

**BRAGDON v. BAYSHORE PROPERTY OWNERS ASSOCIATION, INC.**, 251 A.3d 661, [C.A. No. 2018-0159-JTL \(Del. Ch. March 11, 2021\)](#).

### Reading the DUCIOA.

The Owner of several rental properties in a townhome and condominium community sued the board for declaratory judgment, attorney's fees, and costs against the "Property Owners' Association," (the townhomes) alleging the association acted in an "*arbitrary and capricious*" manner to retaliate against him for earlier, unrelated litigation he won against it. One of his tenants ordered satellite television service, but the installer mistakenly placed satellite dish antenna on the roof in violation of Association architectural guidelines. Owner removed the dish but left its mounting bracket affixed to roof like others in the community. Association fined Owner, billed him for cost of a contractor hired to remove bracket, held a public meeting to consider his appeal of the fines and expenses, and posted minutes of the meeting on the community website. After discovery and extensive motions, Association mooted the underlying dispute by clearing Owner's account of charges, but refused to pay his application for expenses, including his attorney fees and out-of-pocket costs.

### **Shifting Lawyers' Fees Under the DUCIOA § 81-417: "Effects of Violations on Rights of Action; Attorney's fees."**

Addressing issues of first impression, the Court of Chancery, J. Travis Laster, Vice Chancellor, held that:

1. The "**Enforcement Provision**" of the Delaware Uniform Common Interest Ownership Act (the "DUCIOA"), § 81-417 which empowers a court to shift expenses "in an appropriate case," applied to the community, so Owner could rely on § 81-417 to recover his expenses from Association.
2. Owner satisfied the "violation" requirement of the DUCIOA's Enforcement Provision.
3. Owner proved that he was "adversely affected" by the breach of the DUCIOA's violation requirement.
4. The current dispute was an "appropriate case" for awarding expenses under the DUCIOA.
5. An award of expenses under the Enforcement Provision of the **DUCIOA does not require showing "bad faith."**
6. An award of expenses under the enforcement provision of the DUCIOA is not limited to a prevailing party; and
7. As "reasonable" expenses, Owner was entitled to an award of \$12,697.84, which reflected his attorney's fees and expenses he incurred before Association mooted his underlying claims.



## The Court explained rules for Understanding the DUCIOA:

1. Under the DUCIOA, a “pre-existing community” created before the effective date of the Act, September 30, 2009, may be governed by the DUCIOA by amending one of its governing documents to **opt in** to the statute. [25 Del. C. § 81-119](#).
2. If a provision in the governing documents of a “pre-existing community” **conflicts** with the 21 sections, (now 27 since 10-15-2021 amendment) enumerated sections of §81-119, then the “*Enumerated Provisions*” of the statute **supersede the existing provision of the community's governing documents**. [25 Del. C. § 81-119](#).
3. Other than the “Enumerated Provisions” of the DUCIOA, the rest of the statute **does not apply** to “**pre-existing communities**,” unless the community has opted-in. [25 Del. C. § 81-119](#). [Note: § 81-121 allows adopting all of DUCIOA.]
4. As to a “Pre-Existing Community” condominium or cooperative, if an “**existing provision**” in the community's governing documents **conflicts** with the “Enumerated Provisions,” then **the existing provision applies**, so long as the existing provision does not conflict with the Unit Property Act; if a conflict appears with the Unit Property Act, then the Unit Property Act controls. [25 Del. C. § 81-119](#). [Note: this sentence in § 81-119 was *broadened* to apply to all common interest communities by the 2021 amendment to § 81-119.]
5. The “Enumerated Provisions” of the DUCIOA apply when the governing documents of a “Pre-Existing Community” that has not opted into the statute, **do not address an issue**; but the entire statute does not apply to such communities where their governing documents are silent. [25 Del. C. § 81-119](#).
6. The “Enforcement Provision” which empowers court to shift expenses, is an “Enumerated Provision” of Act which potentially applies to pre-existing communities. But only one existing provision in Association’s governing documents potentially conflicted with “Enforcement Provision”: the “Owner Breach Provision” of the section governing “Remedies for Violation of Restrictions,” and Owner Breach Provision did not address the lawsuit filed by Owner against association, and so it did not give rise to “any express conflict” with enforcement provision. [25 Del. C. §§ 81-103, 81-119, 81-417\(a\)](#).
7. **The Delaware General Corporation Law (DGCL)**, with a Delaware “member corporation's” certificate of incorporation and bylaws, constitute the specific corporate contract for the corporation and form a hierarchy, including from top to bottom (1) the DGCL, (2) the certificate of incorporation, and (3) the bylaws. Each of the lower components of the contractual hierarchy must conform to the higher components, and a bylaw that conflicts with the charter is void, as is a bylaw or charter provision that conflicts with the DGCL. [8 Del. C. §§ 102\(a\), 109](#).

When the internal corporate contract of a unit Owners' association (or **HOA**) organized as a corporation consists of multiple documents and the association attempts to adhere to the DUCIOA by recording its bylaws with the recorder of deeds, making them “bylaws” according

to the DUCIOA, traditional Corporation Law principles “should derive the Corporation Law contract”--meaning that association's charter, bylaws, and the Delaware General Corporation Law will be consulted, and the traditional corporate hierarchy will determine what provisions control, DGCL or DUCIOA. The outcome of that analysis establishes the HOA contract for the association that must be measured against the DUCIOA, and, if the HOA contract contains provisions that *conflict* with the DUCIOA, then the *DUCIOA controls*. 8 Del. C. § 101 et seq.; 25 Del. C. § 81-101 et seq.

Owner-Bragdon's properties are in a “pre-existing community,” created before effective date of the DUCIOA, which did *not opt into* DUCIOA. The Owner sued the Association because of retaliation with charges it imposed against Owner for failing to remove mounting bracket mistakenly placed his unit's roof in violation of architectural guidelines. Owner established that Association violated a provision of community's “declaration” and a mandatory provision of DUCIOA, so Owner could recover expenses under DUCIOA's “Enforcement Provision.” The Association violated the declaration by failing to provide Owner with required *notice and opportunity* to take corrective action before having bracket removed, and its **board of directors acted in “arbitrary and capricious” manner by taking enforcement action against Owner and treating him differently than others similarly situated.** 25 Del. C. §§ 81-103(6), 81-103(17), 81-103(38), 81-119, 81-302(f), 81-417(a).

To **recover expenses under the “Enforcement Provision”** of the DUCIOA, which empowers a court to shift expenses “in an appropriate case,” a party must have been “*adversely affected*” by the breach of the provision's violation requirement. 25 Del. C. § 81-417.

Owner-Bragdon showed that Association breached the declaration by failing to provide him with requisite notice and opportunity to take corrective action before having bracket removed, thus, ***selectively enforced*** guidelines in an **arbitrary and capricious manner** by taking enforcement action against him that **treated him differently than others similarly situated, imposed fines and charges that did not comply with its own rules, and engaged in “sharp practices” during the resulting lawsuit.** 25 Del. C. §§ 81-119, 81-302(f), 81-417(a).

Because the DUCIOA is based on the Uniform Common Interest Ownership Act, (UCIOA) a uniform statute drafted by the Uniform Law Commission, **the UCIOA is a helpful source of interpretive guidance for the DUCIOA.** 25 Del. C. § 81-101 et seq.

“Consumer-friendly policies animate the UCIOA” upon which the DUCIOA is based. 25 Del. C. § 81-101 et seq.

The **“Enforcement Provision” of the DUCIOA**, which empowers a court to shift expenses “in an appropriate case,” **grants broad discretion to the trial court** when deciding what constitutes “an appropriate case.” 25 Del. C. § 81-417.

Delaware law generally treats expense shifting as a discretionary matter for the trial court.

**An award of expenses under the “Enforcement Provision” of the DUCIOA” does not require showing “bad faith.”** 25 Del. C. § 81-417.

When interpreting statutes, courts strive to avoid creating surplusage.

Fact that expense shifting under the Enforcement Provision of the DUCIOA to shift expenses “in an appropriate case,” could cause ***the members of an association having to fund an award of expenses*** does not nullify a claim under the enforcement provision. [25 Del. C. § 81-417.](#)

An award of expenses under the “Enforcement Provision” of DUCIOA, **is not limited to a prevailing party and, thus, may accommodate a situation in which the plaintiff obtains relief through voluntary action by the defendant in response to the filed lawsuit.**

“**Legislative facts**” are the empirical assumptions about the world that courts make when deciding cases.

DUCIOA is a “*consumer-protection* statute” which contains provisions **designed to address the concern that the board of an association may use its power to enforce rules, levy fines, and impose assessments in an overbearing and harmful manner.** [25 Del. C. § 81-101 et seq.](#)

Authorization of expense shifting in the Uniform Common Interest Ownership Act, **encourages Owners to bring litigation to enforce restrictions on prohibited conduct.** [25 Del. C. § 81-101 et seq.](#)

When evaluating **the reasonableness of an attorney fee award**, trial courts must consider the factors in the *Delaware Lawyers’ Rules of Professional Conduct*, which are:

(1) time and labor needed, novelty and difficulty of questions involved, and skill requisite to perform the legal service properly.

(2) likelihood, if clear to client, that acceptance of the employment will prevent other employment by the lawyer.

(3) fee customarily charged in the locality for similar legal services.

(4) amount involved and results obtained.

(5) time limitations imposed by client or by circumstances.

(6) nature and length of professional relationship with client.

(7) experience, reputation, and ability of the lawyer or lawyers performing the services;  
and

(8) whether the fee is fixed or contingent.

In addition, trial courts are to consider whether number of hours devoted to litigation was excessive, redundant, duplicative, or otherwise unnecessary.

## UNREPORTED DECISIONS

**TACK v. LIPETZ, TRUSTEE OF THE MARY MEADE LIPETZ REVOCABLE TRUST**  
**DATED, [C.A. No. 2020-0576-PWG](#). (Del. Ch. October 6, 2021 Griffin, Master)**

The Court decided the amount of damages against the defaulted defendant and the plaintiff's claim against that defendant for attorneys' fees under the DUCIOA, 25 *Del. C.* §81-417. Based upon the evidence presented, the Court held the defaulted defendant was liable to plaintiff for \$18,707.00 in damages for lost rental income, plus post-judgment interest at the legal rate. The Court denied Plaintiff's request for attorneys' fees.

Tack sought an injunction against the Lipetz Trust and the Association, seeking to "abate trespass" and "nuisance" from a continuing flow of leaking water from an upstairs condominium bathroom which was poorly maintained. This caused leakage and grout repairs, causing a loss of rental income for the downstairs unit, and resulting money damages. The Court determined the damages were caused by trespass and not by violation of governing documents or the DUCIOA. Thus, the plaintiff could not recover Attorney's fees under section 81-417, in *Bragdon* reported above.

**WYNNWOOD CONDOMINIUM ASSOCIATION v. CEKINE, [C.A. No. N19L-06-039 ALR](#). (Del. Super. January 27, 2021, Rocanelli, J.)**

This is the Court's decision on a Motion to Vacate Default Judgment, the Court GRANTED for good cause due to the judicial emergency related to the COVID-19 pandemic.

The Association filed pursuant under the Delaware Uniform Common Interest Ownership Act ("DUCIOA")<sup>[2]</sup> to collect delinquent assessments owed by Defendant "Cekine," a condominium owner, to the Association, "Wynnwood."

Superior Court Civil Rule 55(c) permits the Court, in its discretion, to set aside a default judgment under Rule 60(b).

Delaware Superior Court Civil Rule 60(b) controls relief from judgment stating:

"On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; ... or (6) any other reason justifying relief from the operation of the judgment."

"Generally, three factors should be considered when determining whether an entry of a default judgment should be vacated.<sup>[8]</sup> First, the court must determine whether culpable conduct of the defendant led to the default and, if so, whether it was excusable.<sup>[9]</sup> Excusable culpable conduct, also known as excusable neglect, "is neglect which might have been the act of a reasonable person under the circumstances."<sup>[10]</sup> If a satisfactory explanation has been established for excusable neglect, the court must next determine whether the defendant has a meritorious defense.<sup>[11]</sup> The defaulting party needs 'to make some showing that, if granted, the outcome may be different from what it will be if the default judgment is permitted to stand.'<sup>[12]</sup> Finally, the court must determine whether the plaintiff will be prejudiced."

In *Battaglia v. Wilmington Savings Fund Society*, the Delaware Supreme Court found that a dispute between parties concerned with how much money is owed was enough to satisfy the requirement of showing that the outcome may be different. Similarly, the parties are not concerned with whether Cekine owes Wynnwood money, but rather *how much* money is owed.

**GREEN v. CARL M. FREEMAN COMMUNITIES L.L.C.**, [C.A. No. 2020-0989-SG](#). (Del. Ch., May 19, 2021. GLASSCOCK, V. Ch.)

This post-trial Opinion addresses who rightfully controls Bayside Community Association, Inc. (the “Association”), the unit owners’ association for Bayside, a Delaware common interest community (the “Community” or “Bayside”). Defendant, Carl M. Freeman Communities, L.L.C., is both the developer of the Community and the controller of the Association’s board, and, therefore, the Association. Plaintiff is a homeowner.

Unit owners’ associations are required under the DUCIOA for all common interest communities. Associations have broad authority over the common property of the development, including levy of assessments for “common expenses.” The Plaintiff alleges that, under DUCIOA § 81-303, the Defendant had to transition its control of the Association to the homeowners when 75% of “the units that may be created” in the Community were sold.

Defendant relies on an exception in § 81-303 for ***master planned communities***. That exception permits communities to designate, *in their Declaration*, when control must be handed over. Defendant argues Bayside is a master planned community and, its charter—which allows the developer to control the Association until 90% of units have been sold—is conclusive of when the developer’s control must terminate. Plaintiff does not contend that Bayside has crossed the 90% threshold.

DUCIOA requires that unit-holders’ associations must be created, and may be controlled by the developer, aka “declarant” for a period after units begin to be sold. The statute relied upon by the Plaintiff, 25 *Del. C.* § 81-303(c), states in part:

“...the declaration may provide for a period of declarant control of the association, during which a declarant . . . may appoint and remove the officers and members of the executive board. Regardless of the period provided in the declaration, and **except as provided in § 81-223(g)** of this title, a period of declarant control terminates no later than the earlier of: (i) . . . 60 days after conveyance of 75 percent of the units that may be created to unit owners other than a declarant . . . .”

Defendant relies upon 25 *Del. C.* § 81-223(g), which is a subsection of the “master planned community statute” of DUCIOA. That section says:

“[t]he period of declarant control of the association for a master planned community terminates in accordance with any conditions specified in the declaration or otherwise at the time the declarant, in a recorded instrument and after giving written notice to all the unit owners, voluntarily surrenders all rights to control the activities of the association.”

For a master planned community, the declaration controls the timing of the homeowners’ association handoff; for all other communities to which DUCIOA applies, the 75% rule controls.

The term “Master Planned Community” is not defined in DUCIOA’s Definitions, § 81-103. But it is described in 25 *Del. C.* § 81-223 itself. Subsection (a) states:

“The declaration for a common interest community may state that it is a master planned community if the declarant has reserved the development right to create at least 400 units that may be used for residential purposes, and at the time of the reservation that declarant owns or controls more than 400 acres on which the units may be built.”

“In other words, the developer may choose master planned community status for a large common interest community by claiming it in the community declaration. The declaration itself must be recorded in the county in which the community exists, in the chain of title.”

Bayside’s declaration is its community “charter.” The Original Bayside Community Charter (the “Charter”) states in the Preamble that Bayside is “a mixed-use master planned community.” In Section 16.3, entitled “Changes in Master Plan,” the Charter states “[e]ach Owner acknowledges that Bayside is a master planned community, the development of which is likely to extend over many years.” This satisfies § 81-223(a)’s requirement that the declaration state that the Community is a master planned community. The parties agreed that Bayside meets § 81-223(a)’s size requirement.

Bayside’s Charter includes terms dictating when control of the Association must be relinquished by the Defendant to the homeowners. The Charter states the Defendant “is entitled to appoint a majority of the members of the Association’s board of directors” until the earlier of:

- (a) when 90% of the total number of Units permitted by the Master Plan have certificates of occupancy issued thereon and have been conveyed to Persons other than builders holding title for purposes of construction and resale;
- (b) December 31, 2024; **or**
- (c) when, in its discretion, the Founder so determines and declares in a recorded instrument.

The Court held that Bayside is a master planned community under the meaning stated in DUCIOA. “The role of the judiciary in interpreting a statute is to determine and give effect to the legislature’s intent.” That intent is “reflected by unambiguous language.”

Plaintiff points to § 81-119, entitled “Applicability to preexisting common interest communities and approved common interest communities,” which enumerates a list of sections of DUCIOA that “apply to all common interest communities . . . created in this State before the effective date” of DUCIOA, “but those sections apply *only with respect to events and circumstances occurring after the effective date* and *do not invalidate* existing provisions of the declaration . . . that do not conflict with this chapter.” It also states that “[a]ny preexisting common interest community . . . has the *right to amend its declaration* . . . to comply with any *or all* of the requirements of this chapter, or . . . [it] may select particular additional sections of this chapter to apply to that community without adopting the entire chapter.” Since § 81-223 does not appear in the list of sections that “apply to all common interest communities . . . created . . . before the effective date,” Plaintiff argues, Bayside, which was created before DUCIOA was



enacted, cannot be a master planned community under § 81-223 unless it amends the Charter, post-enactment, to explicitly incorporate § 81-223.

The Court decided Plaintiff's reading of § 81-119 contradicts the intent of that section. Instead, § 81-119 confers a benefit to developers of preexisting communities by noting that some new statutory requirements apply, but only prospectively, and not retroactively. It also confers a benefit by clarifying that communities' declarations are not invalidated if they do not conflict with DUCIOA. "In other words, § 81-119 is benefit-conferring, not benefit-withholding, to grandfathered common interest community developers. It would be odd to read it as depriving Bayside of the benefit of its master planned community designation."

**CAMPANELLI v. THE COFFEE RUN CONDOMINIUM COUNCIL, [C.A. No. 2018-0391-JRS.](#) (Del. Ch., 2021) V. Ch. Sights**

The "Campanellis" purchased the right to construct a building ("Building A") in the Coffee Run Condominium complex (the "Condominium") in New Castle County, Delaware. Building A is not yet constructed. The Campanellis want to build it, but Defendants, Coffee Run Condominium Council (the "Defendants" or the "Council"), do not approve of the proposed plans.

The Council's authority to govern the Condominium flows from a "Code of Regulations" and the "Declaration," which together are the "Governing Documents." After decades of inactivity, in 2015 the Campanellis submitted several designs and proposals for the construction to the Council, which rejected the submissions alleging none complied with the Condominium's "Declaration Plan." Soon after, the Council notified the Campanellis the Council would charge their share of the Condominium's common element expenses going forward and for the year before the notice. The Campanellis sued shortly after.

After limited discovery, the parties each moved for summary judgment on four issues: (1) whether the Campanellis must pay condominium fees for units yet to be built; (2) whether the Council's rejection of the Campanellis' current building proposal is valid; (3) whether Building A, once constructed, should be subject to separate accounting and billing; and (4) whether the Campanellis' may recover their attorneys' fees because of the Council's conduct during the litigation.

The Court ruled: the Campanellis do not owe condominium fees for unbuilt units; the Council's rejection of the Campanellis' building proposal is invalid; and the Campanellis may separate accounting and billing, as requested, for Building A's "maintenance with the new building owners being responsible for all maintenance, repairs and upkeep of the new building and the existing unit owners being required for all maintenance, repairs and upkeep of the existing buildings." The Campanellis, however, were not entitled to reimbursement of their attorneys' fees.

Here's why:

The Condominium is governed by the Declaration and the Code of Regulations. The Declaration, is governed by the Delaware Unit Property Act (the "DUPA"), and its original form required that the Condominium be used only for residential purposes.

A condominium's Governing Documents can exempt the owners of unbuilt units from condominium fees. Thus, it is appropriate to look first to the Governing Documents, which are treated as a contract under Delaware law, for direction about the Campanellis' obligations as owners of Building A. "The principles governing contract interpretation are well settled. Contracts must be construed as a whole, to give effect to the intentions of the parties." And, "where the language of a provision in a condominium's enabling declaration or code of regulations is clear and unambiguous, this court will afford that language its *ordinary* meaning."

The Campanellis asked that they may construct Building A according to the designs and proposals in their latest submission to the Council (the "Building Plan"). Specifically, the Campanellis argued: the Declaration's *architectural review provision*, which purportedly authorizes the Council to reject the Campanellis' Building Plan, *is so lacking in standards or criteria it is invalid* under Delaware law; the Declaration Plan, appeared to restrict the Campanellis' ability to construct additional parking, is invalid under Delaware law and the DUCIOA or subject to reasonable modification; and the Council's denial of the Campanellis' proposal for separate accounting and billing for the new units is "***arbitrary and capricious.***"

"This Court consistently has held that the absence of a clear, precise, and fixed standard in an architectural review covenant renders that portion of the deed restriction unenforceable." Section 17(c), was stricken, meaning, the Council is not empowered independently to review and reject the Campanellis' Building Plan.

**STATE OF DELAWARE, v. PATRICIA KOSTYSHYN**, [ID No. 1805013096, Cr. A. No. IN18-06-0376](#). (Del. Super. April 29, 2021.) Wallace, J.

In January of 2019, Patricia Kostyshyn was convicted of a single count of **felony criminal mischief** after a two-day jury trial. She was charged and convicted after she stuffed a rag into a bathtub drain causing it to overflow into the two condominium units below her own.

Kostyshyn was sentenced to two years imprisonment, suspended in whole for one year of supervised probation. The court ordered her to pay restitution totaling \$11,700.82 for the damage caused by her criminal mischief—that is \$8,152.79 to Governor House Condominiums, \$3,048.03 to one of the victim unit owners, and \$500.00 to the other. At sentencing, the Court ordered it would retain jurisdiction over Ms. Kostyshyn under this sentence to "ensure the payment of costs, fines, [and] **restitution** ... until any fine or restitution imposed shall have been paid in full" and that might include the entry of *a* civil judgment under 11 Del. C. § 4101 (6), which says that whenever restitution is not paid promptly upon its imposition or under the Court's order, the Prothonotary shall cause the judgment to be entered upon the Court's civil judgment docket.

After appeal to the Supreme Court found no error, the case was returned to the Superior Court. **Violation of probation** reports were filed and hearings held that primarily focused on having made little effort to pay her restitution.

The Superior Court Commissioner's Report described the facts:

1. In 2003, Kostyshyn and her two brothers purchased a third floor unit in the Governor's House Condominium complex ("Governor's House"). Kostyshyn resided in the unit.



2. In 2015, Governor's House sued the Kostyshyn's for unpaid condominium assessments dating back over ten years. The lawsuit eventually led to a judgment against the Kostyshyn's in February of 2018 for **\$138,716.69 in unpaid condominium assessments and fees, attorney's fees, court costs and prejudgment interest**.

3. The criminal offense occurred shortly after the judgment. On April 17, 2018, a resident in one of the lower condominium units called the property manager to report water running into her unit from above. The property manager investigated and discovered that the source of the water was the bathtub in Kostyshyn's unit. The bathtub faucet had been turned fully on and a rag had been stuffed into the drain causing the water to overflow and flood the unit. The property manager photographed the scene, removed the rag, and shut off the water. He then reported the incident to the police.

Because all other conditions of probation were satisfied, the Court discharged Ms. Kostyshyn from probation and entered a civil judgment on the civil docket of the Court for the balance of the restitution: \$11,657.82. This allows the victims to use such collection processes as outlined in the *Common Interest Community Advisory Council's manual on "Collecting Delinquent Assessments Without a Lawyer,"* like wage attachment, liens against all real property owned, and inventory and seizure and sale of personal property.

**ROSEMARY ANGELO, TRUSTEE, v. SOUTHERNESS MAINTENANCE CORP.,** [C.A. No. CPU4-19-004547](#) (Com. Pleas. January 15, 2021) Horton, J.

The issue on appeal was whether the homeowners, the Angelo's, had to pay the assessments imposed by the homeowners' maintenance corporation, Southernness. Angelo argued that it was unlawful for Southernness to assess charges because the developer violated state, federal and county laws related to constructing the Community. In support of his argument, Mr. Angelo introduced photos of the Community, expense reports from Southernness, Legacy at Odessa National budget reports from 2016, and excerpts from several code sections including: New Castle County Unified Development Code §§ 40.27.420, 40.27.440, 40.27.510, and Delaware Code Title 25. Mr. Angelo asserts that because of these violations he offset the assessments and pay only what he thought was an appropriate amount. Mr. Angelo did not describe or provide any evidence as to how he arrived at the offset amount. At one point, Southernness stipulated that violations of the law may have occurred within the Community but emphasized that any such violations were the responsibility of the Community's developer.

Delaware courts have found that ***"the obligation for homeowners in common-interest communities to pay association assessments is not conditioned on the fulfillment of the association's obligation to the homeowners."*** In *Linden Green Condominium Ass'n v. Cesar*, 2015 WL 4094242, at \*2 (Del. Comm. Pl. July 7, 2015) this Court previously ruled that whether or not an association failed to repair a pipe that prevented a homeowner from renting his condo to potential tenants, that failure did not absolve him from paying his assessments to the association **Failure to pay assessments causes harm to a community as a whole. *Id.*** **Delaware public policy also favors the unconditional obligation to pay assessments despite any liability a homeowners association may bear to the homeowner.** [Park Centre Condominium Council v. Epps](#), 1997 WL 817875, at \*2 (Del. Super. May 16, 1997). **Delaware**

**law is quite clear that a party with a grievance against an association is not entitled to withhold payment of lawful assessments.”**

**SALT MEADOWS HOMEOWNERS ASSOCIATION, INC., v. ZONKO BUILDERS, INC.,** [C.A. No. 7C-05-018 RHR.](#) (Del. Super., May 27, 2021) R, Robinson, J.

This case alleges **defective or negligent construction** of townhome condominiums, alleging \$3 Million in repairs. Defendant, “Zonko”) a general contractor, built **Salt Meadows Townhomes Condominium**, of twenty units in five buildings, in Fenwick Island, Delaware. Plaintiffs are owners of twenty units and the homeowners’ association (collectively, “Salt Meadows”). In 2016, several homeowners noticed **water damage in their units.** An engineer hired by Salt Meadows determined that construction deficiencies caused significant water infiltration. Salt Meadows’ complaint alleges four grounds for recovery: negligent construction, breach of contract, breach of express warranty, and breach of implied warranty. Repairs to correct the construction deficiencies and to correct the damage caused by those deficiencies are ongoing. As of December 2020, none of the units had been repaired, and a few units had undergone no repairs.

“Because the reasonableness of the costs incurred is in dispute, the motion is DENIED, for determination of damages after trial.”

**RAWLS, v. THE COMMONS AT STONES THROW, et. al.,** [C.A. No. N17C-08-163 FWW.](#) (Del. Super. January 29, 2021) Wharton, J,

Rawls sued the defendant condominium association alleging that he ***sustained personal injuries*** when he fell into a drainage ditch at The Commons at Stones Throw, at night, in a field, where there were no signs or fences. Rawls alleged that TCST allowed a dangerous and defective condition to exist, which caused him to fall and suffer injuries, including a fractured wrist and dislocated shoulder.

Specifically, he alleges TCST was negligent and/or careless because it permitted a drainage ditch “to be accessible with no fencing, warning, or lighting so as to make the risk perceptible” violating the standard of care it owed him as a business invitee and causing him to slip and fall. He sought *compensatory and special damages for his injuries sustained from his fall.*

TCST contended that it was responsible for repair and maintenance only, and that *the real responsible parties were the individual unit owners.*

“As a result, according to TCST, Rawls should have sued them instead of TCST. This argument is plainly wrong for at least two reasons. First, TCST is an association of unit owners, 25 Del. C. § 81-103(5), which may defend litigation ‘in its own name ... on matters affecting the common interest community.’ 25 Del. C. § 81-302(a)(4). Torts alleged to have occurred on the common elements of the complex affect the common interest community and may be defended by TCST. Suing the unit owners individually likely would result in chaotic litigation

with multiple defense counsel engaging in discovery, motion practice and settlement negotiations on behalf of an unknown number of individual defendants. Avoiding those kinds of issues is just one of the reasons condominium home owners associations exist. Second, TCST admittedly was responsible for the maintenance and repair of area where Rawls fell.”

Rawls alleged TCST’s duty to him is in § 343 of the *Restatement (Second) of Torts*, which makes a possessor of land subject to liability for physical injuries caused by the condition of the land only if he:

- “(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.”

The Court ordered that the case proceed to trial on the issues of the liability of the association and the comparative negligence of the plaintiff.

**CIVIC ASSN OF SURREY PARK v. REIGEL**, [CA. NO. 20 19–0961-SEM](#) (April 26, 2021, Molina, Master.)

The HOA sued the homeowners for violation of a deed restriction, for building a shed without approval of the Architectural Committee.

The first issue was whether the developer properly transferred its power to enforce the deed restrictions to owners of the development corporation before its dissolution in 1971, and then whether those owners properly assigned the power to enforce deed restrictions to the HOA. The court declined to appoint a receiver for the defunct development corporation that assigned its enforcement rights to the civic association, pending trial. The homeowners objected to giving their depositions, complaining of substantial expenses already incurred in defending against the lawsuit. The objections were timely but came late in the discovery process. Considering the extensive motions already filed, the court ordered depositions limited to 90 minutes for each defendant. Both sides’ request for attorney’s fees was stayed until after trial.

**WILD QUAIL GOLF AND COUNTRY CLUB HOA, V. BABBIT**, [CA No. 2019–0768-PWG](#) (Del. C. June 3, 2021 Griffin, Master)

The HOA sued to interpret and enforce deed restrictions in a dispute between homeowners and the Homeowners association, under special Chancery Court jurisdiction of 10 *Del. C.* § 348. (Reprinted on our website among the “Important Statutes”).

The homeowners built an addition to their house which the association *alleged* violates the deed restrictions because the color of the addition's roof did not conform to the plans submitted to the HOA or to the approval granted by the HOA. The Chancery Court Master recommended the Court deny the homeowners motion for summary judgment because material facts in dispute required additional proof.

Deed restrictions requiring approval of an HOA or its architectural review committee before a homeowner can erect a structure on her property are enforceable if they articulate a clear, precise and fixed standard the reviewing body must apply. However, restrictions "are viewed with suspicion due to the tendency of such review to be arbitrary, capricious and therefore unreasonable," and are "strictly construed." "If a restriction is vague and imprecise or unclear, the grant of authority normally is not enforceable. And, in reviewing requests under the restrictions, an association or its architectural committee cannot unreasonably withhold approval, and "any doubts as to the architectural review functions reasonableness must be resolved in favor of the landowners." Restrictions based on abstract aesthetic desirability are impermissible, and deed restrictions allowing for denial based on the lack of visual harmony "can be upheld if there is a reasonable, non-arbitrary basis for the reviewing authority to assess whether a proposal would disrupt the visual harmony of the affected community." Deed restrictions are construed in accordance with their plain meaning in favor of a homeowner and against a homeowner's association.

The Court discussed that the deed restrictions specified that the architectural committee can consider the "suitability of the proposed building or other structure and materials" on the site: (the "Suitability Standard") and whether the structure will be harmonious within its surroundings and adjacent or neighboring properties: (the "Harmony Standard"). The Court noted the Harmony Standard is similar to standards in other deed restrictions upheld by courts if the community possesses a "sufficiently coherent style" and the standard is fairly applied based on that style.

"The proper construction of the operation of a contract... Is purely a question of law, as is the proper interpretation of specific language." Interpreting deed restrictions is a matter of contract interpretation and provisions are construed by determining original intent from the plain and ordinary meaning of the words." Under Delaware caselaw, contracts are read "as a whole," "so as not to render any part of the contract mere surplusage," or to "render a provision or term meaningless or illusory" and give words their common or ordinary meaning and interpret them as would any objectively reasonable third-party observer. It is well established that Delaware courts can look to dictionaries for assistance in determining the intended meaning of contract terms.

The court found a material dispute remained about the reasonableness of the architectural committee's application of the standard and recommended the court inquire more thoroughly into the facts to clarify the application of law to the circumstances and that the court denied summary judgments.

## RECOMMENDATIONS FOR CHANGES TO DELAWARE LAW OR COURT RULES TO IMPROVE REGULATION AND OPERATION OF COMMON INTEREST COMMUNITIES

The Act requires the Ombudsperson to report:

“Recommendations for changes to Delaware law or rules of court procedure designed to improve the regulation and operation of common interest communities made by the Ombudsperson and the Common Interest Community Advisory Council.”

29 *Del. C.* §2546 (e).

The Advisory Council’s “Legislation-Change of Law Committee” is considering several proposals for changes to law or Court rules. Besides the subjects the Committee selects, the Ombudsman submits subjects for study for consideration, as issues are uncovered.

### **Studied by The Legislation Committee of the Advisory Council:**

**Neighborhood Improvement Districts (NIDs):** In 2021, New Castle County asked for Ombudsman’s comments when developing its legislation proposing authority to create “Neighborhood Improvement Districts.” It will authorize the County or a troubled neighborhood requiring more services, including enhanced services beyond what is covered by county taxes, to seek or have imposed, a “Neighborhood Improvement District” corporation, (similar to a common interest community governing association) created to assist an existing community association (even a common interest community) with governance, contract negotiation for services at lower rates, and pay a small assessment to cover what is not covered by County taxes for such things as centralized trash collection, snow removal, enhanced security by police, etc. Proposed for consideration by the General Assembly in 2022.

### **Under Study:**

**Reserves for Planned Subdivision Communities** The complete, catastrophic collapse of the Champlain Towers Condominium in Florida, resulting in a hundred horrible deaths raised nationwide interest in examining reserves to support inspection and repairs of structures to avoid such catastrophes. The DUCIOA requires budgets for condominiums and cooperatives to include reserve funds for repair and replacement of common elements, § 81-324 (a), and reserve studies prepared by experts must be fully funded. Owners in noncondominium and cooperative, planned subdivision communities with significant, expensive amenities (e.g., swimming pools, club houses, playgrounds, roads, streetlights, etc.) expressed concern that their community is not funding (or adequately funding) a “repair and replacement reserve” account, as required by the DUCIOA or the Unit Property Act for condominiums. Concerned owners anticipate large, unaffordable, special assessments. They seek changes to the DUCIOA compelling the Association to establish and fund reserves.

**Common Interest Community Registration.** The Ombudsperson Act charges the Advisory Council with advising the Ombudsperson about “development of recommendations for the registration of common interest communities with the State or other political subdivisions.” 29 *Del. C.* § 2546(f) (1) (d). This would assist the Office of the Ombudsperson at several levels,

including providing contact information for every common interest community. The Secretary of State's Annual Franchise Tax reports to the Division of Corporations are not available in digital format for an easy solution and alternative to separate registration. There is no simpler way to identify the estimated 3000+ common interest communities from the 1.5 million corporations whose Annual Franchise Tax reports are filed online with the Division of Corporations. The Ombudsman proposed accepting the Annual Franchise Tax reports of common interest communities as their "registration" but requiring additional information, including: an email address for the community or a responsible officer, (which is required for online filing of an AFTR) if any. The Div. of Corporations stores AFTR records only in unsearchable *image* files. The discussion of this stalled after meeting with Division of Corporations officials.

**Notice of Filing Liens for Delinquent Assessments** Homeowners and their attorneys report that often the homeowner receives no notice that the HOA placed a lien on their home. Some report that the homes of owners not in arrears on their assessments were rescued from foreclosure when notice was given to the homeowner shortly before Sheriff's sale. This can happen for innocent reasons. New Castle and Kent Counties now accept payment and audit of all expenditures made with funds collected from unit owners not affiliated with the declarant together with a list of all items paid for out of association funds that specifically benefited only the units owned by declarant and not the units generally. The audit will be conducted by a certified public accountant that is not an affiliate of declarant. They offer collection and audit of assessments as a service to communities and send two or three follow-up billings. However, the county does not always turn over the funds to the community on the community's schedule for determining late fees. A few communities assumed a homeowner made no payments, or was delinquent, when all payments to the county were on-time. Liens may include payment of the delinquency penalties and interest. Notice to the homeowner that a lien will be recorded creates an opportunity for resolution that may avoid the cost of recording a lien, and mounting fees, penalties, and interest. Nothing now prevents or requires providing notice of recording a lien against a property. Legislation in other states is beginning to include this among other protections already available under DUCIOA.

**Audits for Planned Subdivision Communities.** The DUCIOA requires condominiums and cooperatives to have audits by a CPA every three years, and reviews by an accountant for the intervening years. §81-306 (6). Owners in noncondominium/cooperative communities like "Planned Unit Developments" reported problems of improper financial accounting by declarants and sometimes theft by a treasurer. In another complaint a community commissioned an audit, but the CPA declared the books and records "un-auditable." Audit requirements could extend to non-condominium/cooperative communities and are considered a best practice. The Advisory Council presented a CPA as a speaker at an Advisory Council meeting to address concerns about the expense of audits to smaller and self-managed communities, including a recommendation to consult with smaller CPA firms and asking about their experience with smaller community association audits.

**Earlier Disclosure of Governing Documents to Purchasers.** The DUCIOA requires that sellers provide copies of governing documents and other important information to purchasers

by the date of contract to purchase a home in a common interest community in §§ 81-408 (a); 81-409 (a). Many homeowners report complete unawareness of bylaws and limitations on free use of their property agreed to by purchasing in a common interest community. While many realtors provide these documents earlier and explain the content and significance of the documents and the restrictions they contain, others, including some developers, do not. Others have asked if they have to be paper documents or can be emailed. Providing documents well before the date of contracting, or the date of settlement, gives potential purchasers a better opportunity to gauge whether they can live comfortably under the restrictions for the community or would be happier in a different community.

**Transition/Turnover Requirements.** The Advisory Council is undertaking a project to draft a Transition Manual to help acclimate new Boards on the responsibilities of managing a community after transition from developer to owner control. The DUCIOA says little about requirements for the declarant to prepare the first homeowner elected board to take control of the Association after the period of declarant control. The DUCIOA, when it applies, requires election of several homeowner representatives to the board during the period of declarant control. § 81-303 (d). Homeowners in many new and pre-existing communities report the declarant simply “handed over the keys” to a representative of the Association after the period of declarant control. Boards of many communities, new and preexisting, are unaware of essential business practices including:

- The need for filing state and federal nonprofit franchise tax forms to maintain their nonprofit status.
- Basic conflict of interest and business judgment rules and financial practices.
- Collection procedures.
- Many other governance issues.

Some states require Declarants to provide training by recognized certifying groups like CAI and others, at no charge to new board members during declarant control, and the first Owner elected board.

Without some introduction to operating an association governed by the DUCIOA, the Unit Properties Act, Delaware General Corporations Law, declarations and bylaws, boards often make mistakes that invalidate their actions, or worse. Several states and New Castle County have requirements for transition/turnover, including a checklist of documents and information the developer must provide, and a negotiated contract for transition and others.

Best practices of the best declarants involve homeowner involvement on committees, as required by the DUCIOA, and introduce newly elected boards (and those interested in running for the board seats) to the process of running a community through training and transparency to see how the association must run. Most agree that the best run communities had the best transition periods. Some jurisdictions, including counties in Maryland, require board members

to attend an educational session like the Ombudsman's Joint CAI "Board leadership Development Workshop," or certify they have taken online courses.

**Collections Policy.** Two attorneys provided a draft of a "Collections Policy" and a draft of legislation requiring a collections Policy to guide boards in a uniform procedure for collection that protects owners from selective or discriminatory practices, and the Association from claims of discrimination, while allowing the certainty of next steps in collection delinquent assessments. This proposal is under review by Advisory Council's Legislation Committee.

**Chancery Court Jurisdiction Sharing.** In 2021 Senator Stephanie Hansen approached the Ombudsman's Office, the Chancery Court and the Justice of the Peace Court to discuss whether some Chancery jurisdiction could be shared with the Justice of the Peace Court for faster and cheaper resolution of some frequent Common Interest community issues. The Ombudsperson's Office identified the two most frequent complaints we receive seeking mediation or arbitration: 1.) Board refusal to provide access to, or copies of association books and records, usually financial records dealing with expenditure of assessments; and 2.) Board delay or refusal conducting Annual director elections required by governing documents. While these are "core jurisdictional issues" of the Court of Chancery, the Court identified governance issues, mainly Architectural Review committee or "ARC" complaints, which we see far less than records and elections complaints. Discussions are continuing.

**Amending 10 Del. C. §348.** This statute allows the Chancery Court to order expedited mandatory mediation of cases seeking interpretation and enforcement of deed restrictions in HOA disputes, but not condominium disputes. Experience shows that while mediation might be expedited, discovery demanded by the parties after mediation often extends the time to resolution to rival un-expedited trials. The statute limits the Court's discretion to award attorney's fees by requiring it to order the losing party to pay the attorneys' fees of the winning party *after trial*, with only limited judicial discretion without balancing interests normally required by the "American Rule" (wherein parties generally pay their own attorneys' fees). The risk of attorneys' fee awards increases the stakes and hardens positions, making cases harder to settle. Instead, they become "winner take all." In prior years, the parties in several cases opted to file cases without reference to this section, resulting in each side bearing its own attorneys' fees and costs. Some cases reported above involve litigation over the award of attorneys' fees under §348.

**Registering Community Association Managers.** Complaints have disclosed instances of community association managers providing false or inaccurate information to owners and potential owners and several instances of "borrowing" Community association funds for personal purposes. CIC Association managers are not licensed like real estate *property* managers. The Ombudsman has recommended and sought comment from Community Associations Institute and has asked the Advisory Council to explore minimal registration requirements including: background checks, certificates from respected education programs, experience requirements, bonding and insurance requirements, and supervision by the Division of Professional Regulation. Two states with Ombudsman's programs only established registration requirements after two million dollars of association assessments were



embezzled by association managers. Bonding and background checks came too late in those states.

**Additional Education of Real Estate Sales Agents About Common Interest**

**Communities.** The Ombudsperson receives several complaints each year that the purchaser told the real estate agent or sales representative they did not want an HOA community, or they were never informed that they were buying into a Common interest community, until they received an invoice for the annual assessment. Our Office refers complaints to the Real Estate Commission, but their persistence suggests greater training is required. In 2021 a new connection was made with a new president of the Real Estate Agents association. We are discussing and planning educational programs for Continuing Education of agents about the Office of the Ombudsperson, and special information specific to Common Interest communities.

## ADVISORY COUNCIL

The Act created the “Common Interest Community Advisory Council” to advise the Ombudsperson about issues relating to common interest communities. The members of the Council were appointed by government officials including:

- The Governor
- The Mayor of the City of Wilmington
- The County Executive or President of County Council in each county
- The Speaker of the House and the President *Pro Tempore* of the Senate
- The Secretary of State
- The Real Property Section of the Delaware State Bar Association
- The President of the Home Builders Association of Delaware
- The Chief Executive Officer of the Community Associations Institute (CAI)

The Council added *ad hoc* position including:

- A representative of the real estate sales and development industry

A list of the members of Council is available online and in the Appendix. Advisory Council now consists of knowledgeable, interested, skilled and hard-working representatives of different aspects of common interest communities from unit owners, board members, City and County officials, the Division of Corporations, educators and developers.

The Council is nearly complete. Because of resignations, the Secretary of State and the New Castle County Executive must replace retired designees to the Advisory Council.

The Advisory Council formed committees to study the topics assigned by the Act. In 2018 Council reorganized the Committees around common functions, and created Mission Statements. A table of committees is included in the Appendices with Advisory Council information

- Collections; Legislation; and Processes Committee.
- Community Conflict Resolution/ADR Committee.
- Community Registration Committee.
- Office Operation Committee.
- Education Committee.
- Mentoring Committee.

### **Additional Committees**

The Advisory Council formed the Mentoring Committee in 2016. A notice on the Ombudsperson’s website asks if a community wants a mentor, or if a person will mentor a

community HOA. Committee members counseled few communities in 2021 with only one or two requests.

Another committee formed by the Advisory Council in 2016 is the Education Committee. It assisted in developing each of the educational programs presented in 2017 through 2021 and is developing more programs of interest to common interest community members for presentation in 2022. Members of the Committee develop topics, and agendas, assist in identifying and arranging guest speakers, and participate by speaking at Workshops. In 2021, the pandemic limited live presentations, but Zoom meetings replaced them, including the Board Leadership Development Workshop presented jointly and with tremendous assistance from CAI's Keystone Chapter. The Committee is planning repeat presentations by Zoom of Governance, Collations and Transition workshops prepared in prior years with demonstration trials of Personal Debt Lawsuits to Collect Delinquent Assessments without a lawyer, before a Justice of the Peace in each county. At several workshops the distinguished panel included the Commissioner of the State Human Relations Commission, the President-Elect or president elect of the State Bar Association, a Deputy Chief Magistrate of the county, and the lowly Ombudsman. (All but one of those is a member of the Advisory Council.)

### **Advisory Council Activity**

The Council met six times each in 4 times in 2021, with a quorum at all but one meeting. The schedule is on the Ombudsman's website and in this Annual Report, with the Advisory Council's roster. In 2022, the Advisory Council will generally meet on the on the fourth Wednesday, every other month, starting in January, at 2:00 pm, on the Zoom platform. The meeting in November is on the *third* Wednesday to accommodate Thanksgiving. Due to the pandemic, in person meetings in each county have been and remain suspended. However, attendance has skyrocketed as we send notice and the agenda to members of the public who have signed up on our email list for notice of our meetings and educational offerings. Pre-pandemic we would have between 0-6 members of the public attend. Now we have 18-38 members of the public attend Advisory Council meetings. Time is always reserved for comments from members of the public.

### **Legislation; Collection Committee**

Among the most active committees is the committee charged with studying mechanisms to increase the collection rate for common interest community assessments and Legislation. This is an issue of high importance to the residents of each county. In 2021 the committee studied and prepared an update to the Posted manual on "Collecting Delinquent Assessments Without a Lawyer," a guide for associations and members, focusing on personal debt lawsuits in Justice of the Peace Court without hiring a lawyer." This Guide has been available on Ombudsperson's Website in electronic format, with live links to many forms and videos, and is available for download to personal computers. Shortly after it was published, the Justice of the Peace Court replaced several key forms, so an update was needed and should be finalized in 2022. The Guide was the core of an educational workshop in each county beginning in 2018.

## **Mechanism to Register Communities**

The Committee for Development of Mechanisms for Registration of common interest communities is focusing on the information already available at the Division of Corporations Annual Franchise Tax Report filings. Most common interest community associations are corporations. They are already required to file Annual Franchise Tax Forms to maintain their corporate status. These forms include not only the proper name of the association, but must list officers and directors. A discussion with the Department of State was unsuccessful in identifying a digital database to avoid the expense to taxpayers and community associations of a separate bureau to register common interest communities. Using this approach, associations would not have to file any form other than the Annual Franchise Tax form to register, nor pay an additional fee. This approach also avoids the necessity for developing the same information from each County and each of the 57 incorporated municipalities in Delaware.

The Office considers this a high priority, to announce the existence of the Ombudsperson's website, educational opportunities, the necessity of an IDR process, new legislation, and reminders for such requirements like filing the Annual Franchise Tax Report forms, state and federal, and recording bylaws, among others. Legislation may be needed to provide the information and require the few non-corporate community associations to file with the Division of Corporations.

## CONCLUSION

Vice Chancellor Parsons made these comments about Common Interest Communities:

### **A Note on Homeowners Associations**

Preliminarily, I note that this litigation illustrates all too well some of the procedural and legal pitfalls that the generally volunteer leadership of homeowners associations can experience if they fail to pay attention to their governing documents. Real estate developers establish homeowners associations to control the appearance of a residential subdivision and manage its common area assets during the marketing, managing, and selling of homes in the subdivision. Initially, the developer effectively governs the maintenance organization or entity. The governing documents also provide a mechanism for the developer eventually to disengage itself from the financial and legal responsibility of the maintenance organization, typically by transferring ownership of the entity to the homeowners after selling off a predetermined number of lots.

*After control of a maintenance organization is transferred to the homeowners in the form of the homeowner's association, the association's primary purpose becomes to maintain community facilities, enforce restrictive covenants, and provide services for the benefit of the residents.* Many associations...are incorporated and controlled by boards made up of community homeowners. In that regard, they are subject to a well-defined body of corporate law, like the [Delaware General Corporation Law]. But, the members of the homeowners association who take governance positions on the board frequently have little to no experience with corporations or the laws that govern them and, as a result, may end up taking actions that conflict with the association's governing documents or the law. The problems of running a homeowners association often are compounded by the difficulty of finding individuals willing to serve on the board in the first place. Similar problems arise when only a relatively small percentage of the homeowners in a subdivision attend important meetings of their homeowners association, like the annual meeting.

*Adams v. Calvarese Farms Maintenance Corporation, Inc.*, 2010 WL 3944961 (Del. Ch. Sept. 17, 2010).

The experience of the Office of the Common Interest Community Ombudsperson demonstrates the truth of V.Ch. Parson's comments. Many issues worry, concern, and anger those in the Common Interest Community, whether declarants and developers, or members of associations/owners, or the associations' boards. Many concerns and misunderstandings result from not reading or understanding the governing documents. Both the board or the homeowner, and sometimes the declarant, are guilty of this.

The Act's requirement of Internal Dispute Resolution (IDR) is very beneficial. It requires a complainant and the board to read, cite, and quote the provision violated. Often this appears to resolve the complaint by exposing the misunderstanding of the governing documents.

Only one set of bylaws reviewed to date, contained a process that owners could use to address issues with Boards or Declarants leading to “notice and opportunity to be heard,” and independent review. The IDR process helps fill that role. Communities are now including the Ombudsman’s IDR process whether they are new or reviewing their governing documents.

There is also widespread confusion and misunderstanding about the interplay of the laws and governing documents that affect those in the Common Interest Community, and the processes available for remedying violations of the laws and governing documents.

Educational and training opportunities for boards were minimal in Delaware. But because of the Act, CAI made its first joint “Board Leadership Development Workshop” presentation in 2015. It has been offered every year since. These are the best-attended workshops of the CAI Keystone Chapter, which received an award from CAI for the Joint presentation with the Ombudsman’s Office. The Advisory Council presented three of its own Workshops: “Collecting Delinquent Assessments in JP Court Without a Lawyer,” “Governance” and “Transition.” Similarly, the Advisory Council presented several workshops and presentations in 2021 besides the CAI Joint Workshop. Council planned more Workshops for 2021, but could only present one, due to the COVID 19 Pandemic. As the members of the Common Interest Community pay more attention to the governing documents, problems in communities should decrease.

The ability of the Ombudsperson to issue subpoenas in appropriate cases may lead to fewer instances of theft of association funds paid by homeowners, and fairer treatment of owners and boards.

There is much work to do. The Common Interest Community Ombudsperson Act is the best resource available to address many issues.

Respectfully submitted,

Christopher J. Curtin  
Deputy Attorney General  
Common Interest Community Ombudsperson

# APPENDICES

**General Information**  
**Provided to all Contacting the Office**  
**Addressing Frequently Requested**  
**Explanations**





## Office of the Common Interest Community Ombudsperson

### Delaware Department of Justice

### General Information and Instructions

#### Ombudsman's "Internal Dispute Resolution" (IDR) Process: Filing a Complaint

All community associations, Homeowners associations, Maintenances Corporations, Condominiums associations and declarants must comply with the Office of the Ombudsman's **"Internal Dispute Resolution" (IDR) Procedure Template**. If the board does not comply, follow the directions and forms on the Ombudsman's website for "Procedure for Filing a Complaint."

To bring a complaint to the Office of the Ombudsman, the statute requires that you must ***first present it, in writing, to the board, on a "form"*** adopted by the community. However, if there is no community form, you and the Association *must* use the form required by the Ombudsman's Act: **"Internal Dispute Resolution Complaint Form."**

Separate each of your complaints. Then answer the IDR Form questions 1-7 as a separate group for each of your complaints, before adding each complaint to your IDR Complaint Form. Label your separate complaints with individual descriptions, letters, (A, B, C...), or numbers, (1, 2, 3, ...), or Roman Numerals (I, II, III, IV...).

The Ombudsman's "Internal Dispute Resolution" (IDR) Form is available on our website. Our website is shown and linked below.

- [The Procedure for Filing a Complaint](#), with links to:
- The ["Template Internal Dispute Resolution Procedure"](#) required by the Ombudsman's Act,
- A downloadable and fillable ["Internal Dispute Resolution Complaint Form,"](#) Fill out this form and deliver it to the board, *not* to the Office of the Ombudsman, and
- The [Ombudsman's "Contact & Complaint Form"](#) If your Internal complaint is not resolved using the IDR Procedure, attach the "Internal Dispute Resolution Complaint" form to the "Contact & Complaint" form and file it with us.

## Template Internal Dispute Resolution Procedure

The Ombudsman's "**Template**" for handling "Internal Disputes" within the community is an *example* policy that satisfies the Ombudsman's Act, which your community can adapt and adopt by resolution, or rule, or policy.

The Template states a model process that a board of a community can edit to identify the community, add any requirements from its governing documents, and adopt for use by the community. It need not be in the declaration, or certificate of incorporation, but could be included, in the bylaws or rules when edited for your community. If adopted it will become the process owners can use to bring written complaints to the board. The board could also adopt a resolution or a rule adopting the Ombudsman's "Template for Internal Dispute Resolution" published on our website as the procedure for Internal Dispute Resolution for the community.

*Absent an Internal Dispute Complaint Form and procedure, you and the board must use the Ombudsman's Template.* Attach a copy of this Template procedure to your internal complaint for the Board to consider.

## Governing Documents-A Limitation on the Ombudsman's Authority.

The Ombudsman's Act requires each common interest community to have an *internal* process for resolving potential violations of the documents and laws governing a community. Those documents include the:

- Declaration of Deed Restrictions,
- Community's Certificate of Incorporation,
- Community's Bylaws or Code of Regulations,
- Rules properly adopted by the board, and
- Resolutions of the board.

The Laws *governing* a community might include:

- Some State and Federal statutes such as the Fair Housing Act,
- Some of the "Delaware Uniform Common Interest Ownership Act," (The DUCIOA),
- The Unit Property Act (for condominiums older than 2009),
- The Delaware General Corporation Law,
- A few other laws in Title 25 of the Delaware Code, as listed in the Ombudsman's Web page on "Important statutes,"
- County Code or municipal code, and
- The Ombudsman's Act

**The Ombudsman's Office does not handle or review:**

- **Criminal Complaints, (Call the police for your area)**
- **Consumer Fraud (File a Complaint with the DOJ Consumer Protection Unit)**
- **Construction Defect Complaints (Contact County Code Enforcement)**
- **Contract Violations (Contact a private lawyer)**

## Ombudsman's Review of Common Interest Community Complaints

If the *Internal* Dispute Process is unsuccessful, you may attach the complete IDR Complaint Form with exhibits to the Ombudsman's "Contact & Complaint" form, with the additional, statutorily "Required Information," which includes copies of the Governing documents. These are necessary for us to determine what law applies.

We usually offer to provide Mediation or Arbitration, even Binding Arbitration to resolve disputes. The Office of the Ombudsperson has **no authority to make orders**, (unless the parties agree in writing to "binding arbitration"). **We cannot order arbitration or mediation.**

By statute, our review is limited "To assist [you] in understanding [your] rights and responsibilities and the processes available to [you] according to the law, regulations, and documents governing your respective common interest community," 29 Del. C. § 2544 (2), "regarding potential violations of the law, regulations, or documents *governing* [your] respective common interest community." § 2544 at (9).

**We do not review other statutory violations like Consumer Fraud, County Code violations, contract disputes, construction defects, criminal violations, or other complaints, using this process.**

Our review will not be a *decision* like a court makes, if the parties did not agree to binding arbitration. Generally, we can make no *order* about your complaint. Nor can we *represent* either party or side to a dispute, since the Ombudsperson serves as mediator or arbitration when the parties agree.

**For legal advice, legal interpretation or legal representation you must consult a private lawyer experienced in community association law.**

**"Review" Is Not Court Enforceable, Nor A "Decision."**

Once we administratively process the complaint it will be ready for review. Because of the tremendous response to this Office, and since our resources are very limited, we have a significant backlog of matters ahead of yours for review. We cannot provide updates, since that takes time and scarce resources from review of other, equally important pending matters. We ask your patience and consideration of other options.

### Other Processes Available:

- If the parties agree in writing to mediation or arbitration, we will schedule it at a mutually convenient time. The Act requires fees for this service as explained at our website link for "Alternative Dispute Resolution." Forms of agreement and more information are there.
- If the parties prefer ADR but not by the Ombudsman, we can refer the dispute to the **Court of Common Pleas' "Community Mediation Program."** No lawsuit or fee is required. However, a referral must come from a law enforcement agency, including the Office of the Ombudsman. Request referral using the Ombudsperson's "Contact & Complaint Form" available on our website.

- There are other mediation services.
  - Center for Community Justice (CCJ)  
1131 Airport Road  
Milford, DE 19963  
(302) 424-0890  
email: [communityjustice@peoplesplace2.com](mailto:communityjustice@peoplesplace2.com)  
Website: <http://peoplesplace2.com/programs-services/center-for-community-justice/>

Mediations are free to the community at the request of either party and participation in mediation is confidential and voluntary. Mediation consists of a face-to-face meeting with all concerned parties, along with trained mediators. The parties determine the outcome.

- Most declarations of deed restrictions state that besides the board, any unit owner can enforce any deed restriction by suing in the **Court of Chancery**. You would be wise to consult a lawyer experienced in community association law before doing so. Chancery Court has special authority to interpret and enforce HOA deed restriction and ordering *mandatory* mediation. A trial will follow, if necessary. Attorney fees can be shifted to the unsuccessful party. 10 *Del. C.* § 348, is on our website among the “Important statutes.” The Court may decide not to use this statute if a condominium is involved, but has similar authority.
- For assistance finding a lawyer, the [Delaware State Bar Association offers an on-line “Lawyer Referral Service.”](http://DSBA.org) Go to the website at DSBA.org, and click on “Looking for a Lawyer?” Click on the icon for “Real Estate.” There you will find links for “Homes-Defective Construction,” or “Homeowners Association.”
- Your County may help with **County Code violations** on property, like grass height, and the Stormwater management ponds. Links to each County are on the Ombudsperson’s website

### General Information on Common Interest Communities.

This Office can help in several ways besides “review” of Internal Dispute Resolution complaints. We:

- Provide information about living in a common interest community.
- Provide information about the “Transition” from developer to owner control of the association.
- Provide Information about some services available through each County.
- On request, we can provide your Association Board with a “Mentor”-a volunteer, experienced, HOA board member or director, to help guide your board based on experience and common sense. Sometimes they recommend consulting a private lawyer experienced in community association law, as we do, when a community is having trouble.

## **Additional Resources.**

Some background information will help you understand the language, legal basis for, and governance of your community association. Look at “*An Introduction to Community Association Living*,” or its 2020 replacement: [“Community Association Living-An Essential Guide for Homeowner Leaders”](#) and the 27 sections of the “DUCIOA” that apply to some pre-9/30-2009 communities (listed in the DUCIOA, § 81-119). Both are available on our website.

**The DUCIOA now requires all communities to record their bylaws.** If your bylaws are silent on a subject, or unavailable, there is an argument, the sections of the DUCIOA listed in § 81-119 are the current controlling law, unless they conflict with your declaration or certificate of incorporation or bylaws. Here are links, or to view these documents on our website:

- [“An Introduction To Community Association Living”](#) or its 2020 replacement: [“Community Association Living-An Essential Guide for Homeowner Leaders”](#)
- The [“DUCIOA” – The Delaware Uniform Common Interest Ownership Act](#):

Consider looking over Community Associations Institute’s [“Homeowners Leaders Page:”](#) It has lots of free, downloadable information for homeowners living in common interest communities, and their boards.

## **Get Started by Getting and Reviewing your Community’s Governing Documents.**

Most of your questions are probably answered in the governing documents. These are part of the official documents of your community. Some are recorded in the County Recorder of Deeds Office. Governing documents include:

- The Plat Plan or Plot Plan,
- The Declaration of deed restrictions,
- The Certificate of Incorporation, (available through the Division of Corporations),
- The Bylaws, (since 2009, required to be recorded in the Recorder of Deeds Office)
- The Rules of the community, and
- Resolutions of the Board.

All members of your community should review these since they create mandatory obligations including enforcement of deed restrictions and enforceable annual assessments for maintaining common areas. Board members should be familiar with them.

# **THE COMMON INTEREST COMMUNITY OMBUDSPERSON ACT**

## DELAWARE CODE TITLE 29

### State Government

#### State Offices Created by Constitution

#### CHAPTER 25. STATE DEPARTMENT OF JUSTICE

#### Subchapter IV. Common Interest Community Ombudsperson

##### **§ 2540 Short title.**

This subchapter shall be known as the “Common Interest Community Ombudsperson Act.”

79 Del. Laws, c. 408, § 1; 70 Del. Laws, c. 186, § 1.

##### **§ 2541 Definitions.<sup>1</sup>**

For the purposes of this subchapter, the following definitions shall apply:

- (1) “Bylaws” shall have the meaning as used in § 81-103 of Title 25.
- (2) “Common interest community” shall have the meaning as used in § 81-103 of Title 25 and includes small preexisting cooperatives and planned communities as referenced in § 81-120 of Title 25.
- (3) “Common interest community association” shall have the meaning ascribed to “association” or “unit owners’ association” as used in § 81-103 of Title 25 and includes associations or unit owners’ associations for small preexisting cooperatives and planned communities as referenced in § 81-120 of Title 25.
- (4) “Declarant” shall have the meaning as used in § 81-103 of Title 25.
- (5) “Declaration” shall have the meaning as used in § 81-103 of Title 25.
- (6) “Department” means the Department of Justice.
- (7) “Executive board” shall have the meaning as used in § 81-103 of Title 25.
- (8) “Office” means the Office of the Common Interest Community Ombudsperson.
- (9) “Ombudsperson” means the Common Interest Community Ombudsperson.
- (10) “Rule” or “rules” shall have the meaning as used in § 81-103 of Title 25.
- (11) “Unit” shall have the meaning as used in § 81-103 of Title 25.

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<sup>1</sup> The definitions all refer to definitions found in the Delaware Uniform Common Interest Ownership Act, or the “DUCIOA.” Its citation is 25 *Del. C.* Chapter 81.

(12) “Unit owners” shall have the meaning as used in § 81-103 of Title 25.

79 Del. Laws, c. 408, § 1; 70 Del. Laws, c. 186, § 1.

**§ 2542 Common Interest Community Ombudsperson; creation, appointment, role, term of office, and vacancy.**

(a) There is established within the Department an Office of the Common Interest Community Ombudsperson.

(b) The Attorney General shall appoint the Ombudsperson, consistent with the qualifications for the Ombudsperson set forth in § 2543 of this title.

(c) The Ombudsperson shall be the head of the Office and is charged with managing the Office consistent with the powers and duties vested in the Ombudsperson by § 2544 of this title, within the limitations of the funds appropriated by the General Assembly.

(d) The Ombudsperson shall serve at the pleasure of the Attorney General.

(e) A vacancy in the Ombudsperson position shall be filled in the same manner as the original appointment.

79 Del. Laws, c. 408, § 1; 70 Del. Laws, c. 186, § 1.;

**§ 2543 Common Interest Community Ombudsperson; qualifications.**

The Ombudsperson must:

(1) Be a member in good standing of the Bar of this State.

(2) Have at least 5 years of experience in the practice of law in this State.

(3) Have experience in real estate law, including common interest community law.

(4) Have experience in conflict and alternative dispute resolution.

(5) Not engage in any other business or profession that conflicts with the powers and duties of the position or the Office.

(6) Comply with all restrictions on political activity applicable to Department employees pursuant to § 2509A of this title.<sup>2</sup>

79 Del. Laws, c. 408, § 1; 70 Del. Laws, c. 186, § 1.;

**§ 2544 Common Interest Community Ombudsperson; powers and duties.**

The Ombudsperson shall have the following powers and duties:

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<sup>2</sup> “**§ 2509 Conflict of interest.** No member of the Department of Justice shall act as attorney or counsel in any controversy in which the State, a county or a municipality has an interest except in the member’s official capacity.”  
Common Interest Community Ombudsperson **2021 Annual Report Appendix 70**



(1) To contact declarants, common interest community associations, the executive board of a common interest community association, unit owners in common interest communities, and other interested parties to inform them of the services available through the Office. In addition to any other method used to publicize the Office's services, the Ombudsperson shall maintain a website containing information about the Office, contact information, the services available through the Office, any information required to be placed on the website by other provisions of this chapter, and any other information deemed appropriate by the Ombudsperson.

(2) To assist declarants, common interest community associations, the executive board of a common interest community association, unit owners in common interest communities, and other interested parties in understanding their rights and responsibilities and the processes available to them according to the law, regulations, and documents governing their respective common interest community. The Ombudsperson is not the attorney for declarants, common interest community associations, the executive board of a common interest community association, unit owners in common interest communities, or other interested parties; no attorney-client relationship shall be implied or established by the Ombudsperson's communication with such persons, and the Ombudsperson may not act as or appear to act as an attorney in a legal action brought by such persons.

(3) To organize and conduct meetings to educate declarants, common interest community associations, the executive board of a common interest community association, unit owners in common interest communities, and other interested parties about their rights and responsibilities and the processes available to them according to the law, regulations, and documents governing their respective common interest community.

(4) To prepare and publish educational and reference materials about common interest communities and to make these resources available in print and on the Office's website. The materials about common interest communities shall include general information about the roles, rights, and responsibilities of the various parties, suggestions for the orderly operation of the common interest community association, mechanisms for internal dispute resolution, or any other information deemed appropriate by the Ombudsperson.

(5) To develop and publicize procedures intended to result in fair elections for members and officers of a common interest community association.

(6) To provide monitors and vote counting services to common interest community associations, intended to result in fair elections for members and officers of a common interest community association, when 15% of the total voting interests of a common interest community association, or 6 unit owners, whichever is greater, petition the Ombudsperson to do so.

(7) To provide meetings, mediation, or other forms of alternative dispute resolution as may from time to time be requested by declarants, common interest community associations, the executive board of a common interest community association, unit owners in common

interest communities, or other interested parties. Nothing in this paragraph shall affect the right of a declarant, common interest community association, the executive board of a common interest community association, unit owners in common interest community, or other interested parties from proceeding pursuant to the procedure established by § 348 of Title 10.<sup>3</sup>

(8) To establish a template of reasonable written procedures for the executive board of a common interest community association to adopt to internally handle complaints from unit owners and other interested parties. Each common interest community association shall adhere to the established written procedures when resolving complaints from unit owners and other interested parties. The procedures established by the Ombudsperson and adhered to by the common interest community association may include the following, in addition to procedures outlined in the common interest community association's declaration, bylaws, or other governing documents:

- a. That the complaint to the common interest community association must be in writing.
- b. That a sample complaint form, if any, on which the complaint must be filed shall be provided upon request.
- c. That the common interest community association's complaint written procedure shall include the process by which the complaint shall be delivered to the common interest community association.
- d. That the common interest community association shall provide written acknowledgment of the receipt of the complaint to the complainant within 14 days of receipt. Such acknowledgment shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the complainant at the address provided or, if consistent with established procedure of the common interest community association, delivered by electronic means, provided the sender retains sufficient proof of the electronic delivery.
- e. That any specific documentation that must be provided with the complaint shall be described in the common interest community association's complaint procedure. In addition, to the extent the complainant has knowledge of the law or regulation applicable to the complaint, the complainant shall provide that reference, as well as the requested action or resolution.
- f. That the common interest community association shall have a reasonable, efficient, and timely method for identifying and requesting additional information that is necessary for the complainant to provide in order to continue processing the complaint. The common interest community association shall establish a reasonable timeframe for

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<sup>3</sup> “§ 348 Disputes involving deed covenants or restrictions.” A Chancery Court master may “mediate disputes involving the enforcement of deed covenants or restrictions” in certain circumstances. 10 Del. C. § 348.

responding to and disposing of the complaint if the request for information is not received within the required timeframe.

g. That, within a reasonable time prior to the consideration of the complaint, the complainant shall be notified of the date, time, and location that the complaint will be considered. For purposes of this paragraph, "reasonable time" shall mean such time as established by the common interest community association's complaint procedure, but shall not be less than 7 days prior to the date for consideration of the complaint. Notice of the date, time, and location for consideration of the complaint shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the complainant at the address provided or, if consistent with established procedure of the common interest community association, delivered by electronic means, provided the sender retains sufficient proof of the electronic delivery.

h. That after the final determination is made, the written notice of the final determination shall within 14 days be hand delivered or mailed by registered or certified mail, return receipt requested, to the complainant at the address provided or, if consistent with established procedure of the common interest community association, delivered by electronic means, provided the sender retains sufficient proof of the electronic delivery.

i. That the notice of final determination shall be dated as of the date of issuance and include specific citations to the common interest community association's declaration, bylaws, or other governing documents, or to an applicable law or regulation that led to the final determination, as well as the registration number for the common interest community association. If applicable, the name and license number of the common interest community manager shall also be provided.

(9) To receive complaints from declarants, common interest community associations, the executive board of a common interest community association, unit owners in common interest communities, or other interested parties regarding potential violations of the law, regulations, or documents governing their respective common interest community. Prior to submitting a complaint to the Ombudsperson, complainants must complete the process established by the Ombudsperson and adopted by the executive board of a common interest community association pursuant to paragraph (8) of this section and must include a copy of the final determination with the complaint filed to the Ombudsperson.

(10) To investigate any complaint received and, if meritorious and appropriate, to provide meetings, mediation, or other forms of alternative dispute resolution to those parties involved in order to assist in the resolution of the complaint.

(11) To refer meritorious violations of existing Delaware law to the Attorney General or other appropriate law-enforcement agency for prosecution.

(12) To subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of books, papers, records or other evidence needed for the exercise of the powers or the performance of the duties vested in the Ombudsperson by this section. The power contained in this paragraph may also be exercised by any other employee of the Office who is a member in good standing of the Bar of this State.

(13) To establish and publish, in print and on the Office's website, procedural rules for meetings, mediation, or other forms of alternative dispute resolution organized pursuant to this section.

(14) To establish and publish, in print and on the Office's website, procedures and forms for accepting complaints from declarants, common interest community associations, the executive board of a common interest community association, unit owners in common interest communities, or other interested parties regarding potential violations of the law, regulations, or documents governing their respective common interest community.

(15) To establish: fees for meetings, mediation, or other forms of alternative dispute resolution; election monitoring; vote counting; or other services as provided by the Ombudsperson pursuant to this section. The amount to be charged for each fee imposed under this paragraph shall approximate and reasonably reflect all costs necessary to defray the expenses related to providing these services.

(16) To make an annual report of the Office's activities to the Governor, the Attorney General, the General Assembly, and the Chief Justice of the Supreme Court on or before December 1 of each year. A copy of the report shall be provided to the Director of the Division of Research. Each such report shall contain:

- a. Statistics on the number of inquiries and complaints handled by the Office;
- b. Information on education and outreach efforts by the Office;
- c. Concerns expressed to the Office by declarants, common interest community associations, the executive board of a common interest community association, unit owners in common interest communities, or other interested parties;
- d. Legal developments impacting common interest communities;
- e. Recommendations for changes to Delaware law or rules of court procedure designed to improve the regulation and operation of common interest communities made by the Ombudsperson and the Common Interest Community Advisory Council;
- f. Any other information deemed appropriate by the Ombudsperson.

(17) To organize and hold public meetings as necessary to gain a comprehensive sense of the issues facing common interest communities in this State. When such meetings are held, at least 1 meeting shall be held in each county at a convenient place within each

county. When such meetings are held, the information obtained from these meetings shall be made part of the report issued pursuant to paragraph (15) of this section.

(18) To perform any other function necessary to fulfill the powers and duties outlined in this section.

(19) To direct the work of the Office consistent with the powers and duties established by this section.

(20) To employ and supervise staff necessary to assist in carrying out the powers and duties established by this section, within the limitations of funds appropriated by the General Assembly.

79 Del. Laws, c. 408, § 1; 70 Del. Laws, c. 186, § 1.;

### **§ 2545 Required information.**

(a) When a declarant, a common interest community association, the executive board of a common interest community association, a unit owner in a common interest community contacts the Office to make an inquiry, request services, or file a complaint, the declarant, a common interest community association, the executive board of a common interest community association, a unit owner in a common interest community shall provide the Office with at least the following information regarding the common interest community at issue:

(1) The name, address, telephone number, and any other contact information for the common interest community association.

(2) The name of the person engaged in property management for the common interest community association or the name of the person who manages the property at the site of the common interest community.

(3) The name, mailing address, telephone number, and any other contact information for those on the executive board of the common interest community association.

(4) The name, mailing address, telephone number, and any other contact information for the declarant.

(5) The declaration, bylaws, and any rules for the common interest community association.

(6) The annual budget adopted by the common interest community association.

(7) The number of units in the common interest community.

(8) The total annual assessment made by the common interest community association.

(b) The Ombudsperson may waive the requirement created in subsection (a) of this section when it is deemed appropriate.

79 Del. Laws, c. 408, § 1; 70 Del. Laws, c. 186, § 1.;

**§ 2546 Common Interest Community Advisory Council.**

(a) The Common Interest Community Advisory Council, referred to as “the Council” throughout this section, consists of 18 members. A member who is on the Council by virtue position may appoint a designee to serve in their stead and at their pleasure. Membership is comprised as follows:

(1) The Governor shall appoint 3 members of the public who are unit owners, as defined under § 81-103 of Title 25, of common interest communities in this State, 1 from each county.

(2) The Mayor of the City of Wilmington.

(3) The County Executive of New Castle County.

(4) The President of the Kent County Levy Court.

(5) The President of the Sussex County Council.

(6) The Speaker of the House shall appoint 3 members.

(7) The President *Pro Tempore* of the Senate shall appoint 3 members.

(8) The Secretary of State.

(9) The President of the Delaware Bar Association shall appoint 2 members from the Real Property Section of the Delaware State Bar Association whose practice involves the creation of, or the handling of disputes arising from, common interest communities.

(10) The President of the Home Builders Association of Delaware.

(11) The Chief Executive Officer of Community Associations Institute

(b) The members of the Council shall serve until a replacement is appointed pursuant to the same process as the member's appointment.

(c) The members of the Council shall serve without compensation, except that they may be reimbursed for reasonable necessary expenses incident to their duties as members in accordance with State law.

(d) The Attorney General shall appoint the Council’s Chair from among the members of the Council.

(e) The number of members who must be present at a Council meeting in order to have a quorum and conduct official business is the majority of members. Counting for quorum does not include member positions that are vacant.

(f) The Council shall do all of the following:

(1) Advise the Ombudsperson regarding issues related to common interest communities, including any of the following:

a. Mechanisms to increase the collection rate for common interest community assessments.

b. The development of conflict resolution procedures within common interest communities.

c. The feasibility of mandatory mediation, arbitration, or another form of alternative dispute resolution for disputes not able to be resolved within common interest communities and, if deemed feasible, how to implement such a process.

d. The development of mechanisms for the registration of common interest communities with the State or other political subdivision.

e. Any other topic the Council deems necessary to advise the Ombudsperson on related to common interest communities.

(2) Advise the Ombudsperson in the operation of the Office.

(3) Study and recommend to the Ombudsperson the adoption, amendment, or rescission of Delaware law or rule of court procedure designed to improve the regulation and operation of common interest communities.

(4) Assist the Ombudsperson in the preparation of the annual report required of the Ombudsperson under § 2544(16) of this title.

(g) The Ombudsperson shall provide support that the Council requests. At a minimum, the Ombudsperson shall prepare the agenda for and minutes of Council meetings and shall post the agenda and minutes as required by the Freedom of Information Act, Chapter 100 of this title.

(h) The Council shall meet at least 4 times each year. The Chairperson, the Ombudsperson, or a majority of the members may call a special meeting of the Council.

(79 Del. Laws, c. 408, § 1; 70 Del. Laws, c. 186, § 1; 82 Del. Laws, c. 219, § 1; 82 Del. Laws, c. 219, § 1. \

# **PROCEDURE FOR FILING A COMPLAINT**



## PROCEDURE FOR FILING A COMPLAINT WITH THE OFFICE OF THE COMMON INTEREST COMMUNITY OMBUDSPERSON

Filing a Complaint with the Office of the Ombudsperson is a two-step process:

**First**, you **must** try to resolve your complaint through an “*Internal Dispute Resolution*” process (or “IDR” process) between a homeowner (or other interested person) and the board. Either a homeowner or the board can start the IDR process by sending a written IDR complaint to the other.

**Second**, if the board **ignores** the IDR complaint; or does not take part in an IDR process; or if the board does not resolve the complaint *internally*, you can file a “Contact&Complaint” form with the Office of the Ombudsperson.

Both forms are linked to this Procedure, and are available on the Ombudsman’s website

Details of each part include:

### **1. File your IDR complaint with the Board, First. The Ombudsperson Cannot Review a Complaint of a Violation of Law or Governing Documents Unless the Board First Gets A Written IDR Complaint:**

- A unit owner or board must first try to resolve a complaint of violating the law or documents governing the Community by using the Association’s Internal Dispute Resolution complaint form.
- If the board has no IDR rules or forms the board must follow the steps in the “Ombudsperson’s Template for Internal Dispute Resolution.” It is available on the Ombudsperson’s website. A “template” is a “sample” or “example” form.
- Write your complaint on the board’s complaint form. But, if the board has none, write your complaint on the form attached to the “Ombudsperson’s Template for Internal Dispute Resolution.” The IDR Complaint form is the last two pages of the Template.
- If a homeowner sends an IDR complaint to the board, the board must use the board’s IDR complaint form and the steps in its bylaws. If the Association has no IDR Form, it must use the Ombudsperson’s Template for Internal Dispute Resolution.
- If the board does not use the steps to IDR, or does not respond to your complaint in 20 days, you can file the complaint with the Office of the Ombudsman. Report the board’s failure to use IDR on the Ombudsperson’s Contact/Complaint Form besides the underlying complaint.
- If a homeowner does not follow the deed restrictions, bylaws or rules, the board can use any process or remedies allowed in the governing documents.

- An “interested person” *other than a unit owner*, or a board, should also first try to resolve a complaint through the association’s or Ombudsman’s IDR procedure.
- The “Internal Dispute Resolution Complaint” is the last 2 pages of the Template IDR procedure. It leaves little room for a complaint, but invites adding pages. Print or make enough copies for you and the board.
  - Please be specific and detailed in describing your complaint.
  - Use the following outline:
    - Describe the general complaint (for example: “The board refused me access to financial documents.”)
    - Next, state the name of the document and section that governs your complaint (for example “Bylaws, Article 4, Section 4.”).
    - Then, write out the exact words of the rule violated. Include necessary parts of the community’s declarations or certificate of incorporation, or bylaws, or rules, or regulations, and any statutes involved. This makes a “roadmap” to understanding your complaint. It will help both the board and the homeowner to understand the governing documents and the complaint. It will help the Ombudsperson if review is required.
    - Explain your complaint like you are telling it to someone you don’t know.
    - Start at the beginning and explain your complaint in the order things happened. It is the easiest way for others to understand.
    - State exactly what you want done to resolve the complaint. Tell the board what *action* you are asking the board to take or *the outcome or result* you want from the board.
    - Sign and date your complaint and add your address, telephone number and email address.
    - Check off how you delivered the complaint to the board.
    - Make and keep a copy for yourself.

## **2. Filing the Complaint- Use the Ombudsperson’s “Contact&Complaint” Form:**

- If the board does not resolve your IDR issue, and your claim involves violation of the law or documents governing your community, you can file the complaint for review by the Office of the Ombudsperson.
- Get a copy of the Ombudsperson’s “Contact&Complaint” Form from the internet or by calling the Ombudsman’s Office. You can fill out, print and even file the

Contact&Complaint Form on the Ombudsperson's Website. Read all of it before filling it out. Make copies for yourself.

- The Ombudsperson's Act requires the Complaint to include "Required Information." You must attach a copy of your community's "governing documents." These include: the declaration; the certificate of incorporation; the bylaws; and the rules and regulations of your community, and other information. Attach everything you sent to the board in the IDR complaint, and all documents sent to you by the board. You need not send a second copy of any document sent by you or the board in the IDR. Please do not send email threads.
- When you complete your Complaint Form and attach all the documents, deliver it to the Office of the Ombudsperson, by hand, by mail, or by email. The address and contact information are on the form. Also, send a check for \$35 to "Department of Justice, Office of the Ombudsperson."
- The Contact&Complaint Form:
  - Must be filed with the Ombudsperson within 30 days of the "final adverse decision" of the board, or the board's refusal to take part in internal dispute resolution (the Ombudsperson may extend this for "good cause");
  - Must be completed in writing on a "Contact/Complaint Form" from the Office of the Common Interest Community Ombudsperson (available at the website of the Office of the Ombudsperson or by calling the number below);
  - Must include copies of any "Required Information"<sup>4</sup> listed in the Contact/Complaint Form and all supporting documents, correspondence and other materials about the issue and the decision, and
  - Must include a check for the \$35 filing fee<sup>5</sup> attached, (the Ombudsperson can reduce this for "good cause"). Make the check payable to "Department of Justice, Office of the Ombudsperson."

You can contact the Office of the Ombudsperson:

Delaware Department of Justice  
Office of the Common Interest Community Ombudsperson  
820 N. French Street  
Wilmington, DE 19801  
Tel: 302-577-8600  
Outside New Castle County: 800-220-5424  
Fax: 302-577-6499

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<sup>4</sup> 29 Del. C. §2545 (a)

<sup>5</sup> 29 Del. C. §2544 (15)

email: [CIC.OmbudsmanDOJ@state.de.us](mailto:CIC.OmbudsmanDOJ@state.de.us)

Web site: <http://attorneygeneral.delaware.gov/fraud/cpu/ombudsman.shtml>

The Ombudsperson will review your complaint and the submitted materials. If the complaint seems “meritorious and appropriate,” the Ombudsperson may offer:

- meetings,
- mediation,
- arbitration or
- other forms of Alternative Dispute Resolution (ADR) to the parties, to help resolve the claim. The parties must agree in writing before the Ombudsman can provide ADR. The Ombudsman can provide ADR only if both sides agree.

**The Ombudsperson cannot not make orders like a court, unless the parties agree to binding arbitration, in writing. More information about ADR is on the website. The Act requires a fee for ADR services.**

The Ombudsperson can investigate a complaint, if necessary, through:

- subpoenaing witnesses;
- compelling the attendance of witnesses;
- compelling witness testimony;
- administering oaths or affirmations;
- taking evidence;
- subpoenaing books, records, papers, or other evidence needed for exercising the powers or performing the duties of the Ombudsperson.
- The Ombudsperson can refer a claim of violation of existing Delaware law to others within the Department of Justice or any other appropriate law-enforcement agency, in the Ombudsperson’s discretion.
- The Ombudsperson may exercise discretion and drop an action, but will tell the parties.

# **TEMPLATE FOR “INTERNAL DISPUTE RESOLUTION PROCESS” (IDR)**

# COMMON INTEREST COMMUNITY OMBUDSPERSON'S TEMPLATE FOR HOMEOWNERS' ASSOCIATIONS' EXECUTIVE BOARDS TO ADOPT FOR *INTERNAL* RESOLUTION OF COMPLAINTS (IDR)

## Introduction

The Common Interest Community Ombudsperson Act requires the Ombudsperson (the "Ombudsperson" or "Office"). "To establish a template of reasonable written procedures for the executive board of a common interest community Association to adopt to *internally* handle complaints from Unit Owners and other interested parties." [29 Del. C. §2544 \(8\)](#). The Act states:

"Each common interest community association shall establish and adhere to the established written procedures when resolving complaints from Unit Owners and other interested parties.

The procedures established by the Ombudsperson and adhered to by the Association may include the following, in addition to procedures outlined in the common interest community Association's declaration, bylaws, or other governing documents."

- The Office of the Ombudsperson interprets this as requiring each "common interest community" (CIC) Association to follow a written procedure for *internally* and informally reviewing and resolving Unit Owner complaints and Association Complaints against a Unit Owner.
- An Association should comply with the requirement of a written procedure by adapting the Ombudsperson's Template, consistent with procedures in the Association's declaration, certificate of incorporation, bylaws, rules and law, and "due process" including "notice and opportunity to be heard."
- The Ombudsperson recommends that boards adapt procedures from the governing documents into a single written "Internal Dispute Resolution" (or IDR) procedure, and resolve any conflicts with the requirements of section 2544 (8), using current understandings of "due process."
- If an Association has no written IDR procedure for resolving complaints from or about Unit Owners, the board should adapt the following procedure to conform to its governing documents.
  - The Office will apply this Template procedure if the Association does not adopt its own.
  - A unit owner may edit this Template to file a complaint with the board if the association has no IDR procedure.
  - The Association can use this procedure for claims against an Owner, as limited in the procedure.

The Office recommends that each Association let Owners know about use of the IDR Complaint forms and give an "opportunity to be heard" *before* filing a lawsuit, or recording a lien on an Owner's home.

**An Owner with a complaint must first use an IDR process to let the board know of a claim involving violation of a governing document or statute before the Ombudsperson can review the complaint. You must file your completed IDR Complaint form with the board. Do not send it to the Ombudsperson unless it is not resolved *internally*. Then you must attach it to the Ombudsperson's "Contact & COMPLAINT" form, as explained in the "Procedure for Filing a Complaint" on the website.**

You can fill out this IDR Complaint form online, save it to your own computer, and print it. Send it to the board, not to the Ombudsperson. Save your copy or print enough for you, the board, and the Ombudsperson.

Please direct comments about this form and these procedures to the Ombudsman.

## **TEMPLATE FOR *INTERNAL* DISPUTE RESOLUTION (“IDR”)**

**[Insert Name of Common Interest Community Association]**

**[Insert Address and Telephone Number of Association or Managing Agent]**

### **PROCEDURE TO FILE AN INTERNAL COMPLAINT WITH THE BOARD**

1. The Unit Owner or other interested person may deliver a Common Interest Community (CIC) Complaint to the Association.<sup>6</sup> The Association may deliver a CIC Complaint to a Unit Owner (“Owner”) or Other interested person. Whoever delivers a CIC Complaint is the “Complainant.” Whoever the CIC Complaint seeks a response from is the “Respondent.”

1.2. The Association shall not charge an Owner a fee to use the process, unless the Association determines the process is being abused.

2. The Complaint must be on the attached CIC Complaint Form, or one substantially similar to the CIC Complaint Form. The Association will provide a copy of the Form to the Owner upon request, or otherwise make the form generally and easily available.<sup>7</sup>

3. The Complainant must deliver the completed CIC Complaint, including all required supporting information to the Respondent. The respondent shall mark on the CIC complaint the date of receipt, and shall mark the date of receipt on copies of the CIC Form if requested by the complainant.<sup>8</sup>

3.1 For these procedures, a party makes “delivery”<sup>9</sup> to the current address provided by the other party in one of the following ways:

- In person,
- hand delivery ,
- USPS “Delivery Tracking,”
- FedEx or other delivery service that creates a record of delivery,
- registered or certified mail, return receipt requested ,or,
- if consistent with established procedure of the Association, by electronic means, provided the sender retains sufficient proof of the electronic delivery.

3.2 If a Unit Owner delivers a CIC Complaint to the Association, the Association must use this Internal Dispute Resolution procedure.

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<sup>6</sup> 29 Del. C. §2544 (8)

<sup>7</sup> 29 Del. C. §2544 (8) (a), (b)

<sup>8</sup> 29 Del. C. §2544 (8) (c)

<sup>9</sup> 29 Del. C. §2544 (8) (c), (d)

4. An Association must acknowledge receipt of an Owner's CIC Complaint in writing within 14 days of receipt by any of the means described in paragraph 3.1.<sup>10</sup>

5. The complainant must deliver any specific documents required to support the CIC Complaint with, the Complaint, must describe the documents and the requested action or resolution.<sup>11</sup> The documentation may include:

- the Declaration;
- the Certificate of incorporation;
- the Bylaws;
- any Rules of the Association;
- any other governing document of the Association;
- notice letters, correspondence;
- bills;
- checks;
- photographs;
- any other document or evidence that supports the CIC Complaint, or applies to the claim, and
- if known, a reference to the law, restriction or regulation applicable to the complaint.

5.1 The Association will make and provide a copy of the governing or corporation documents to the Owner on request. Governing documents include: declarations, the certificate of incorporation, bylaws, rules, covenants or any other documents creating or governing the Association. Corporation documents include other applicable books and records of the Association.<sup>12</sup>

5.2 If the Complainant or Respondent relies upon any law or regulation applicable to the CIC Complaint, they should provide that information, and describe the desired action or resolution in the CIC Complaint.<sup>13</sup>

6A. A party to a dispute may request the other party, in writing, to "meet and confer" in an effort to resolve the dispute. The board shall promptly designate a director to meet and confer. The parties shall meet promptly at a mutually convenient time and place, informally explain their positions to each other, and confer in good faith in an effort to resolve the dispute. Anything the parties agree to must be put in writing and signed by the parties, including a designee of the association. The agreement binds the parties and is judicially enforceable if is signed by the parties; is not in conflict with law or the governing documents of the Association; and is either consistent with the authority granted by the board to its designee or the agreement is ratified by the board.

6B. If the dispute requires additional information, the Association may within 20 days after, make a reasonable, efficient, and timely request for any additional information that is necessary for the Owner to provide in order to continue processing the CIC Complaint.<sup>14</sup> An Owner who is a Respondent, may request additional information within 20 days of receipt of the Complaint.

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<sup>10</sup> 29 Del. C. §2544 (8) (d)

<sup>11</sup> 29 Del. C. §2544 (8) (e)

<sup>12</sup> 25 Del. C. §81-318 (a)(4), (b)

<sup>13</sup> 29 Del. C. §2544 (8) (e)

<sup>14</sup> 29 Del. C. §2544 (8) (f)



6.1 The Respondent will provide the requested information, if any, within 10 days of the request, unless there are unforeseen circumstances. If there are unforeseen circumstances the Respondent must notify the Complainant when the information will be provided.

6.2 The Respondent must respond to and act upon the CIC Complaint within 20 days after the Complainant provides the information requested, or the time expires.<sup>15</sup>

7. The Association must deliver notice to the Owner not less than 7 days before, of the date, time, and location that the Association will consider the CIC Complaint by any means described in section 3.1<sup>16</sup>

8. The Association must give the Owner a full opportunity to explain the Owner's position and evidence, and to call and question witnesses, Association members, employees or representatives. The Association may ask the Owner questions, call and question others.

8.1 Each party must treat the other with civility, dignity and respect. Neither party need tolerate shouting, rudeness, name-calling, or disrespect. Either party may call a 10-minute recess in the meeting.

9. No later than 14 days after the meeting considering the CIC Complaint, the Association shall make its final determination in writing. The Association shall deliver written notice of its final determination to the Owner.<sup>17</sup>

9.1 The notice of final determination shall bear the date of issuance and include:

- the written final determination explaining reasons for the decision;
- quotation of the Associations' declaration, certificate of incorporation bylaws, rules or other governing documents; or
- a reference to any applicable law, regulation or rule that led to the final determination;<sup>18</sup>
- any supporting documents, correspondence, and other materials that led to the final determination;
- the registration number for the Association,<sup>19</sup> if any; and
- the name and license number of the community manager,<sup>20</sup> if any.

10. The notice of final determination must inform the Owner of the right to submit the Association's final determination to the Office of the Ombudsperson<sup>21</sup> in substantially the following form:

**"Notice:**

If the board issues a final decision denying your CIC Complaint, or if the board does not respond to it after 20 days, you have the right to file a Notice of Final Adverse Decision with the Common Interest Community Ombudsperson under to 29 *Del. C.* §2544 (9), (10).

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<sup>15</sup> 29 *Del. C.* §2544 (8) (f)

<sup>16</sup> 29 *Del. C.* §2544 (8) (g)

<sup>17</sup> 29 *Del. C.* §2544 (8) (h)

<sup>18</sup> 29 *Del. C.* §2544 (8) (i)

<sup>19</sup> 29 *Del. C.* §2544 (8) (i)

<sup>20</sup> 29 *Del. C.* §2544 (8) (i)

<sup>21</sup> 29 *Del. C.* §2544 (9), (10)

The notice to the Ombudsperson:

- must be filed within 30 days of the final adverse decision (unless waived by the Ombudsperson for good cause);
- must be in writing on the Ombudsperson's 'Contact/Complaint' form (available on the website of the Ombudsperson or by calling the number below). Fill out the "Contact/COMPLAINT" form completely;
- must include the complete IDR complaint with attachments;
- must include a copy of the board's written decision;
- must include copies of any Required Information<sup>22</sup> listed in the Contact/Complaint form and supporting documents, correspondence and other materials related to the decision; and
- must enclose the \$35 filing fee<sup>23</sup> (unless waived by the Ombudsperson for good cause).

You may contact the Office of the Ombudsperson through:

Delaware Department of Justice  
Office of the Common Interest Community Ombudsperson  
820 N. French Street  
Wilmington, DE 19801  
Telephone: (302) 577-8400  
email: [CIC.OmbudsmanDOJ@state.de.us](mailto:CIC.OmbudsmanDOJ@state.de.us)

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<sup>22</sup> 29 Del. C. §2545 (a)

<sup>23</sup> 29 Del. C. §2544 (15)

# TEMPLATE FOR INTERNAL DISPUTE RESOLUTION (IDR) COMPLAINT FORM

(An editable version is available online)

## Ombudsman's COMMON INTEREST COMMUNITY (CIC) INTERNAL COMPLAINT FORM

Insert Name of Common Interest Community Association

Insert Address and Telephone Number of Association or Managing Agent

The Board of Directors (Board) of the **Community Association Name** (the "Board") adopted this complaint form for filing a written CIC Complaint *internally* with the Board about violations of the community's governing documents including:

- The Plat or Plot plan,
- The Declaration,
- The Certificate of Incorporation,
- The Bylaws,
- The Rules or policy of the community, or
- The applicable law (if known) such as:
  - The Delaware Uniform Common Interest Ownership Act (DUCIOA), 25 *Del. C.* ch. 8;
  - The Unit Properties Act (UPA for Condominiums), 25 *Del. C.* ch. 22
  - The Delaware General Corporation Law (DGCL) 8 *Del. C.* ch. 1
  - The Office of the Common Interest Community Ombudsperson Act, 29 *Del. C.* ch. 2544

This form may be used for other complaints as well.

**Instructions:** You can fill-in this form online at the Ombudsman's website. If you have more than one complaint to explain, please answer these questions for each complaint or document violated and include them all as one complaint to the board.

**For each complaint, please answer these questions:**

1. Describe your claim in a few words. (Examples: Denial of access to records; Violation of bylaws on elections...)

Please Enter Text Here

2. What document (the Declaration, Certificate of Incorporation, Bylaws or Rule) and paragraph number did anyone violate? Please select all that apply. If other, please specify.

- ☐ Plat Plan
- ☐ Declaration
- ☐ Certificate of Incorporation

- ☐ Bylaws
- ☐ Rules
- ☐ Amendment to any Document
- ☐ DUCIOA
- ☐ Unit Property Act
- ☐ General Corporation Law
- ☐ Other

Please Enter Text Here

3. Please quote the part of each section violated.

Please Enter Text Here

4. Explain in what way anyone violated the section, in the order things happened, starting at the beginning.

Please Enter Text Here

5. Describe, explain and attach any documents or other evidence that supports your claim. (Examples: Meeting minutes, Notices, letters, emails, policy statements, photos...)

6.

Please Enter Text Here

7. Please state what you want to the Board to do because of your complaint.

Please Enter Text Here

8. Anything else important to know about your complaint?

Please Enter Text Here

Please sign, date, and print your name and address below and submit this completed form to the Association at the address listed above.

Printed Name: **Please Enter Text Here**

Date: **Please Click Here to Enter a Date**

Signature: \_\_\_\_\_

Your Mailing Address: **Please Enter Text Here**

Lot/Unit Address: **Please Enter Text Here**

Your Contact Preference: **Please Choose an Item**

Your Telephone or cell #: **Please Enter Text Here**

Your Email Address: **Please Enter Text Here**

Other: **Please Enter Text Here**

## NOTICE:

If the Board issues a final decision denying your CIC Complaint, or if the board does not respond to it after 20 days, you have the right to file a Notice of Final Adverse Decision with the Common Interest Community Ombudsperson under 29 *Del. C.* §2544 (9), (10).

The Notice to the Ombudsperson:

- Must be filed within 30 days of the Final Adverse Decision (unless waived by the Ombudsperson for good cause);
- Must be in writing on the Ombudsperson's "Contact/Complaint" form (available on the website of the Ombudsperson or by calling the number below). Fill out the "Contact/COMPLAINT" form completely;
- Must include your complete CIC *Internal* Complaint with attachments;
- Must include a copy of the Board's written decision, if any;
- Must include copies of any "Required Information"<sup>[1]</sup> listed in the Contact/Complaint form and supporting documents, correspondence and other materials related to the decision; and
- Must enclose the \$35 filing fee<sup>[2]</sup> (unless waived by the Ombudsperson for good cause).

You may contact the Office of the Ombudsperson through:  
Delaware Department of Justice  
Office of the Common Interest Community Ombudsperson  
820 N. French Street  
Wilmington, DE 19801  
Tel: (302) 577-8600  
email: [CIC.OmbudsmanDOJ@state.de.us](mailto:CIC.OmbudsmanDOJ@state.de.us)

**I caused this CIC Complaint and all attached documents to be delivered to the Association / Respondent at the address provided by the Respondent on Please Click Here to Enter a Date at Please Choose a Time by the following method of delivery: Please Choose and Item If Selected Options 7 or 8. Please Specify Here**

I made and kept a record of how I delivered the complaint to the board.

Your Name: **Please Enter Text Here**

Signature: \_\_\_\_\_

Date: Please Click Here to Enter a Date

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<sup>[1]</sup> 29 *Del. C.* §2545 (a)

<sup>[2]</sup> 29 *Del. C.* §2544 (15)

# **CIC “CONTACT & COMPLAINT” FORM**



RETURN THIS FORM TO:

(Devuelva Este Formulario a):

**OFFICE OF COMMON INTEREST COMMUNITY OMBUDSMAN**

**DEPARTMENT OF JUSTICE**

**STATE OF DELAWARE**

**820 N. FRENCH STREET, 5<sup>TH</sup> FLOOR**

**Phone: (302) 577-8600 or 1-800-220-5424**

(Teléfono)

**Fax: (302) 577-6499**

**Email: CIC.OmbudsmanDOJ@state.de.us**

(Correo electrónico)

**FOR OFFICIAL USE:**

(Para Uso Oficial)

**CIC#:** \_\_\_\_\_

(Caso No)

**Investigator:**

(Investigador **MININGTON, DE 19801**)

**COMMON INTEREST COMMUNITY – CONTACT and COMPLAINT FORM\***

(Declaración de Querella)

**Your Name:**

(Su Nombre):

**Name of Person or Business Complaint is Against:**

(Nombre de Persona o Empresa):

\_\_\_\_\_  
**Your Home Address:**

(Su Dirección):

\_\_\_\_\_  
**Location:**

(Ubicación):

\_\_\_\_\_  
**Number and Street (Número y Calle)**

\_\_\_\_\_  
**Number and Street (Número y Calle)**

\_\_\_\_\_  
**Development (Urbanización)**

\_\_\_\_\_  
**City (Ciudad)**

\_\_\_\_\_  
**City (Ciudad)**

\_\_\_\_\_  
**State and Zip Code (Estado Y Código Postal)**

\_\_\_\_\_  
**State and Zip Code (Estado y Código Postal)**

\_\_\_\_\_  
**Phone Number (s) (Teléfono):**

\_\_\_\_\_  
**Phone Numbers (Teléfonos):**

\_\_\_\_\_  
**Email Address (Correo Electrónico):**

\_\_\_\_\_  
**Home (Hogar):**

\_\_\_\_\_  
**Work (Trabajo):**

\_\_\_\_\_  
Electrónico):

\_\_\_\_\_  
**Email Address (Correo**

**\*DO NOT FILE A COMPLAINT UNLESS YOU HAVE COMPLETED THE INTERNAL DISPUTE RESOLUTION PROCESS (IDR)\***

## INSTRUCTIONS

### PLEASE READ THROUGH THIS FORM CAREFULLY, BEFORE STARTING

**Definition:** The term “Community” and “common interest community” mean the same thing in this Form. The Community includes you if you are:

- An owner of a Unit of real estate, and
  - your Unit is in a planned community, planned development, condominium, cooperative, or maintenance corporation;
  - your Community is subject to a plan described in the governing documents of your Community, (such as a Declaration, deed restrictions, Bylaws or rules) and
  - because of your ownership, you are obligated to pay a share of taxes, insurance and other costs; and
  - the costs are for funding, managing and supervising common areas that are available to all members of the Community, such as parks, pools, playgrounds, club houses, open spaces, private streets, etc.

The Community also includes:

- The Developer, also known as the “Declarant”; and
- Your neighborhood's governing Association, no matter what it is called, for example:
  - Planned community association or council;
  - Homeowners association or council;
  - Condominium association or council;
  - Cooperative association or council;
  - Community maintenance corporation, association or council; or
  - Other similar organization, no matter how it is named.
- Any other interested party.

**1. You may Contact the Office of the Ombudsperson to make an INQUIRY;**

**a REQUEST FOR SERVICE; or submit a COMPLAINT if you are:**

- a Unit Owner in your Community, or
- a Declarant; or
- a Community Association member; or
- an executive board of a Community Association; or
- any other interested party;

and your complaint concerns potential violations of the law, Bylaws, Rules, regulations, or documents governing your Community.

**2. DO NOT FILE A COMPLAINT BEFORE YOU COMPLETE THE INTERNAL DISPUTE RESOLUTION PROCESS** of your Community’s Association or one established by the Ombudsperson. This is required by the Ombudspersons Act. You must include a copy of the final determination of the Association with the Complaint that you wish to file with the Ombudsperson, AND a \$35 Filing Fee Payable to “DOJ-CICombudsman”.

**3. You must also attach to your INQUIRY, REQUEST FOR SERVICES, or COMPLAINT:**

- a. the Declaration or deed restrictions creating your Community,



- b. the Bylaws of your Community, and
  - c. the Rules of your Community and
  - d. any other document or evidence supporting your Inquiry, Request For Service, or Complaint.
- 4. The Ombudsperson is **not** the attorney for: You, Unit Owners, Declarants, Community Associations, the executive board of a Community Association, or any other interested parties.
  - **No attorney-client relationship is implied or created by the Ombudsperson's contact with you or any person, and the Ombudsperson may not act as your attorney in a legal action brought by you or any other person.**
  - **The Office of the Attorney General and the Office of the Ombudsman cannot provide legal advice, or legal interpretation. We can only provide general, nonbinding explanations of laws and regulations governing common interest communities.**
  - **The goal of the Office, and its statutory responsibility is to:**
    - **educate the public;**
    - **direct you to available Community resources;**
    - **review final adverse decisions from your Association; and**
    - **help unit owners and associations avoid lawsuits and resolve problems informally, through meetings, mediation or arbitration.**

**The Office and the Ombudsperson cannot, however, replace the services of an attorney representing a unit owner's or Association's particular interest.**

- 5. **Please attach COPIES, not originals, of all papers that relate to your Inquiry, or Complaint, including REQUIRED INFORMATION as well as papers such as Notices, advertisements, photographs, contracts, receipts, bills, cancelled checks, written agreements, letters or emails.** (Envíe copias, no originales, de todos los documentos en relación con esta querrela, inclusive contratos, fracturas, recibos, cheques cancelados, cartas o correo electrónico).

## REQUIRED INFORMATION

**The Common Interest Community Ombudsperson Law (29 Del C. §2945) requires that you provide the following information:**

1. Are you a person or one of the following types of organizations? Check all that apply: ☐ A Unit Owner (a homeowner) in a Community?

☐ A person, or family member who owns a residence in a planned Community?

☐ A "Declarant" (or developer) who still owns a Unit that is created by the Declaration or deed restrictions (the Governing documents)?

☐ A person leasing a unit; **and** all of the following are **true**:

- your lease will expire when your landlord's lease expires; **and**
- your lease is longer than 20 years, **and**
- your lease is not for a membership campground?

☐ A Declarant?

☐ A Community Association?

☐ The executive board of a Community Association?

☐ A member or representative of the executive board of a Community association? ☐ A person otherwise interested? If so, please describe your interest:

2. **Reason You Are You Contacting the Office of the Ombudsperson:**

☐ To make an **INQUIRY**? If so, please state your inquiry and its surrounding circumstances in the "Narrative" section of this form. Please keep in mind that the Office of the Attorney General and the Office of the Ombudsman cannot provide legal advice, but can only provide general nonbinding explanations of laws and regulations and documents, governing common interest communities. There is a fee of \$35 to file an Inquiry.

☐ To **REQUEST SERVICES**? The following services are authorized by the Law:

☐ Provide election monitors and vote counting for fair Community Association elections? (Requires 15% of the voting interests, or 6 Unit Owners, whichever is greater, and a fee.)

☐ Provide assistance in understanding the rights, responsibilities and processes available to you through general, nonbinding explanations of laws, regulations, and governing documents governing common interest communities, in general terms, that does not require review of your governing documents.

☐ Conduct a meeting to educate Community members about their rights and responsibilities, and the processes available under law, regulations, and rules.

☐ Provide meetings, mediation, arbitration, or other forms of alternative dispute resolution as requested for disputes other than Complaints. There is a filing fee of \$35, and fees for the mediator's time and expenses.

☐ Describe any other service you seek. We will review your request and determine whether it is within the authority of the Office of the Ombudsperson or other unit or agency.

☐ To file a **COMPLAINT** that has been through your Community Association's or the Ombudsperson's Internal Dispute Resolution Process? Attach a copy of the Association's Final Decision, or statement that the request was ignored. Are you seeking:

☐ Meeting or  
Conciliation? ☐  
Mediation?  
☐ Arbitration that is binding?  
☐ Arbitration that is non-  
binding? ☐ Other? Please  
describe:

**ATTACH A CHECK FOR THE FILING FEE OF \$35.00 PAYABLE TO "DOJ-CIC OMBUDSMAN"**

3. Please provide the following information required by the Ombudsperson's

Law: (1) Contact information for the Community Association:

Name of Association: \_\_\_\_\_

Contact person: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

Mobile: \_\_\_\_\_

Fax: \_\_\_\_\_

Email: \_\_\_\_\_

Any Other Contact information: \_\_\_\_\_

(2) Contact information for the property manager or the name of the person who manages the property of the Community.

Name: \_\_\_\_\_

Contact person: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_ Mobile: \_\_\_\_\_

Fax: \_\_\_\_\_ Email: \_\_\_\_\_

Any Other Contact information: \_\_\_\_\_

(3) Contact information for the executive board of the Association.

Name: \_\_\_\_\_

Contact person: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

Mobile: \_\_\_\_\_

Fax: \_\_\_\_\_

Email: \_\_\_\_\_

Any Other Contact information: \_\_\_\_\_

(4) Contact information for the Declarant or developer.

Name: \_\_\_\_\_

Contact person: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

Mobile: \_\_\_\_\_

Fax: \_\_\_\_\_

Email: \_\_\_\_\_

Any Other Contact information: \_\_\_\_\_

(5) Please attach all of the following Required Information to this Form. (These documents should be available to you from the Community Association, upon request):

☐ The final decision of the Community Association on your complaint;

☐ The Declaration;

☐ The Bylaws;

☐ The Rules for the Community;

☐ The annual budget adopted by the Community Association.

☐ Any other documentation or evidence that supports Your Inquiry, Request or Complaint, including if appropriate: meeting notices, minutes of Association or executive board meetings, correspondence, bills receipts, photographs, advertisements for the community, as examples.

(6) State when your community was created or approved.

Month \_\_\_\_\_ Day \_\_\_\_\_ Year \_\_\_\_\_

(7) State the number of Units in your Community.

\_\_\_\_\_

(8) State the amount of the annual assessment made by your Community Association.

\_\_\_\_\_

**SPECIFIC DETAILS IF PERTINENT TO YOUR COMPLAINT OR CONTACT:**

(9) What date did you purchase your Unit? \_\_\_\_\_

Please attach a copy of your purchase contract and all related papers.

(10) Who was your Sales Agent? Name, Firm, Address, Telephone, Email:

\_\_\_\_\_

(11) Did you obtain advertising information about the Community, or its features? What did you receive:

\_\_\_\_\_

\_\_\_\_\_

Please attach a copy of any advertising of the Community, and its features that you relied upon, and any current advertisement of the Community. Please describe information you were told if there is no document:

(12) Were you represented by an attorney at Settlement? Name:

\_\_\_\_\_

NARRATIVE	

• **You may add additional sheets if necessary.** (Favor de escribir su querella en letra de molde y agregue otra página si es necesario):

This image shows a full page of white paper with horizontal blue ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

## ADDITIONAL INFORMATION

Have you complained to the Unit Owner or Community Association? ☐ YES ☐ NO  
(If yes, to whom?)

What was the response?

tr

Have you made a complaint with any other governmental or regulatory agencies?  
☐ YES ☐ NO

If yes, who? \_\_\_\_\_ Which agency? \_\_\_\_\_

At what address? \_\_\_\_\_

Please provide the names, telephone numbers, and addresses of persons needed as witnesses.

Please provide the names, telephone numbers, and addresses of other known persons affected.

Does an attorney represent you in this matter? ☐ YES ☐ NO If  
yes, provide attorney's name and address:

Have you or anyone else filed a lawsuit against anyone regarding this complaint?  
☐ YES ☐ NO

If yes, provide name of court and names of the parties:

Case number: \_\_\_\_\_ Date case filed: \_\_\_\_\_  
Attach copies of the court documents to this complaint.

**READ THE FOLLOWING CAREFULLY BEFORE SIGNING BELOW:**(Favor de leer lo siguiente cuidadosamente antes de firmar):

- **I have attached copies of all papers that relate to this complaint.**  
(He fijado copias de todo documento relacionado con esta querella).
- **I understand that in order to successfully handle this complaint the Office of the Ombudsperson may need to send this complaint to the person, organization or firm that I have complained about.** (Yo entiendo que para investigar esta querella, la Unida de Protección al Inversor tiene que enviar esta querella a la persona o empresa por cual yo he formulado cargos).

**YOU MUST CHECK ONE OF THE FOLLOWING:  
(FAVOR DE INDICAR UNA DE LAS SIGUIENTES):**

\_\_\_\_ You have my permission to send this complaint to the person, organization or business named in my complaint. (Autorizo que envíen esta querella a la persona o empresa por cual yo he formulado cargos).

\_\_\_\_ You **DO NOT** have my permission to send this complaint to the person or business named in my complaint. (**No autorizo** que envíen esta querella a la persona o empresa por la cual yo he formulado cargos).

The information contained in this complaint is true to the best of my knowledge.  
(La información incluida en esta querella es correcta según mi mejor conocimiento).

**FOR COMPLAINTS**

[ ] I have attached a completed copy of the Internal Dispute Resolution complaint, and the complete response to it.

[ ] I have enclosed a check in the amount of \$35.00 payable to: "DOJ-CICombudsman" for the filing fee.

---

**Signature**  
(Firma)

---

**Date**  
(Fecha)

**Please be advised that Attorney General's Office including the Office of the Ombudsperson is prohibited by law from giving you legal advice, legal opinions, or acting as your private attorney. Therefore, you may wish to consult with a private attorney to discuss your legal rights and remedies.**



# **ADR PROCEDURES AND FORM AGREEMENTS**

## **ALTERNATIVE DISPUTE RESOLUTION PROCESSES AND PROCEDURES**

### **INTRODUCTION**

A central duty of the Office of the Common Interest Community Ombudsperson is providing “alternative dispute resolution,” or “ADR.” The “alternative” to ADR is a lawsuit in court. The Ombudsperson Act gives the Ombudsperson the “power and duty” “To provide meetings, mediation or other forms of alternative dispute resolution as may from time to time be requested by” members of the common interest community. In addition, following a review of a complaint that completed an association’s “Internal Dispute Resolution” process, the Ombudsperson may offer ADR in an appropriate case. In either case, the Office of the Ombudsperson cannot force parties into ADR. All ADR through the office of the Ombudsperson is voluntary.

The Office of the Ombudsperson can either facilitate or conduct ADR. The Ombudsperson can facilitate ADR by accepting the complaint and forwarding it to the opposing party, and help the parties agree on neutral ADR practitioner if either party objects to the Ombudsperson.

To request ADR through the Office of the Ombudsperson, please complete and submit the Ombudsperson’s Contact/Complaint Form with a \$35 check payable to the Delaware Department of Justice, Office of the CIC Ombudsperson. Additional fees apply whether the Office of the Ombudsperson or another ADR practitioner provides ADR services.

### **ADVANTAGES OF ADR**

Lawsuits are expensive, take a long time, will probably involve the additional expense of attorney’s fees, and put the decision concerning how to resolve a dispute in the hands of an uninvolved third-party, like a judge or jury. Although ADR is available in some courts, it is usually not available until a party files a complaint. By that time attorneys are usually involved, since in courts (other than Justices of the Peace Courts<sup>24</sup>) an attorney must represent a corporation such as a homeowners association. Bylaws of most homeowners associations require a complaining homeowner to pay the association’s attorney’s fees. Even if the homeowner wins, the association’s attorney’s fees are a cost the association must pay from the assessments that all homeowners in the community must pay, unless the association’s insurance covers the fees as a cost of defense.

The Ombudsperson Act does not affect the right to sue under §348 of Title 10. That statute authorizes Chancery Court to order a Master in Chancery to mediate a complaint seeking enforcement of deed restrictions. Although the parties may mediate without attorneys, the association board must have an attorney since it is likely a corporation. This increases the expense compared to informal ADR. The statute allows the Court to order the losing party to pay the attorney’s fees of the party that wins, unless that would be unfair, unreasonable or harsh. This raises the stakes in lawsuits over deed restrictions. A copy of this law is available on the Ombudsperson’s website.

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<sup>24</sup> Justice of the Peace Court Civil Rule 91 permits an officer of a corporation to represent the corporation in Justice of the Peace Court if the officer first files a “Certificate of Representation” with the Chief Magistrate, complies with the other provisions of Supreme Court Rule 57, and pays an annual registration fee of \$20. The form and further information is available at <http://courts.delaware.gov/forms/download.aspx?ID=5348>

Major advantages of alternative dispute resolution include:

- The parties can work out their own solution to issues in some forms of ADR such as conciliation, meet and confer, or mediation;
- ADR can be conducted informally, without resort to courts or even attorneys;
- ADR can be far faster and less expensive than traditional court procedures;
- ADR can take several forms: conciliation, mediation, nonbinding arbitration, binding arbitration or neutral assessment;
- All ADR is voluntary. Both sides of the dispute must agree to participate in ADR.
- The information discussed during any ADR process remains confidential, by agreement or by law, even if there is litigation after unsuccessful ADR.
- A trained ADR practitioner conducts sessions: a conciliator, or a mediator or an arbitrator, who attempts to fairly resolve the dispute and satisfy the needs of the participants.
- All participants have an opportunity to express their feelings about the case and the facts as they see them.
- ADR offers the parties a safe place for reviewing options and enables them to develop their own settlement terms in a mutually agreed format.
- The parties can agree on an ADR Practitioner, or they can seek help with the selection.

## **WHAT FORMS OF ADR ARE AVAILABLE THROUGH THE OMBUDSPERSON?**

The Ombudsperson or a designee can provide the following types of ADR. These are discussed below in order of increasing complexity.

### **CONCILIATION**

“Conciliation” is a process in which an experienced, neutral person or “conciliator” meets with the parties to a dispute, often separately, to informally discuss and negotiate a complaint informally. The conciliator may make suggestions as the parties consider how to resolve a dispute, as well as their own. An association board, by rule or bylaw, should make this process available to resolve disputes internally. The Office of the Ombudsperson can either coordinate or provide conciliation upon request. To request conciliation through the Office of the Ombudsperson, please complete the Ombudsperson’s Contact Complaint Form and the Agreement for Conciliation or Mediation form available on this website.

- The conciliator cannot impose a decision or any penalty on the parties.

- Conciliation is the simplest, fastest, and least expensive form of dispute resolution.
- The parties find their own resolution to a dispute, with or without the assistance of the conciliator.

“Meet and Confer” is another type of conciliation, without the guidance of a neutral person. With or without a neutral conciliator, conciliation follows this process:

- Any party to a dispute involving a homeowner, the homeowners association, the declarant, or other interested party, may request conciliation:
  - (1) A party may request the other party to meet and confer, with or without a neutral conciliator, to resolve the dispute. The request must be in writing. An Agreement for Conciliation or Mediation is available on this website.
  - (2) A homeowner may refuse a request to meet and confer. The association may not refuse a homeowner’s request to meet and confer.
  - (3) The homeowner’s association board must promptly designate a director to meet and confer.
  - (4) The parties must meet promptly at a mutually convenient time and place, explain their positions to each other, and confer in good faith to resolve the dispute.
  - (5) The parties must put any agreement resolving the dispute in writing and sign it. The board’s authorized designee must sign the agreement on behalf of the association.
- An agreement made through conciliation binds the parties and is judicially enforceable as a contract if both of the following conditions are satisfied:
  - (1) The agreement is not in conflict with law or the governing documents of the common interest development or association.
  - (2) The agreement is consistent with the authority granted by the board to its designee or the agreement is ratified by the board.
- An Association may not charge a homeowner a fee to participate .

## **MEDIATION**

“Mediation” is the most common method used for resolving disputes. Mediation offers the parties a safe forum for reviewing options and enables the parties to develop their own settlement terms by an agreement. Mediation is a process in which a neutral person called a “mediator” aids the parties in agreeing on how to resolve a dispute. To request mediation through the Office of the Ombudsperson, please complete the Ombudsperson’s

Contact&Complaint Form and the Agreement for Conciliation or Mediation form available on this website.

- The mediator cannot impose a decision or any penalty on the parties.
- The mediator's role is to clarify misunderstandings and ambiguities; to provide a new perspective on disputed issues; and to explore options for agreement.
- Mediation through the Office of the Ombudsperson is voluntary. The parties must agree to mediation and must be present for the mediation conference.
- Mediation is beneficial to both parties because of the time and money saved compared to a lawsuit or trial.

Before the mediation begins, the parties and the mediator sign a written agreement to mediate. A form agreement to mediate is available on this website. The agreement to mediate states that the mediation conference and everything said at the mediation conference is confidential, even if the mediation does not resolve the dispute. It states that neither party can call the mediator as a witness if the case goes to arbitration or trial.

Mediation conferences are informal proceedings. That means that the strict legal rules of evidence do not apply in mediation. This allows for an unrestricted discussion of issues and misunderstandings. If the parties settle, the mediator puts the settlement agreement in writing and all the parties, and the mediator sign it. The agreement describes both the settlement of issues and the future responsibilities of each party. Once signed the agreement is a binding contract, which is enforceable by courts.

If the dispute is not resolved at the mediation conference, the mediator will continue to work with the parties to reach an agreement. Mediation includes all contacts between the mediator and any party, until the parties reach an agreement, or the parties discharge the mediator, or the mediator determines that the parties cannot agree. The context can include telephone conversations, meetings and even additional mediation conferences.

The mediator may terminate the conference if the parties cannot agree. The termination will not bind either party to anything in any other proceeding. If the parties cannot agree after initial mediation sessions, other ADR procedures or more formal processes are available. These include arbitration or filing suit and proceeding with litigation.

The process of mediation often involves:

- The complaining party fills out a Contact/Complaint form requesting mediation and files it with the Ombudsperson, and delivers a copy to the responding party with a copy of an Agreement to Mediate.
- The responding party may supply answering information, provide it to the Ombudsperson, and delivers a copy to the responding party.
- The parties must agree to mediation by signing a written agreement form.

- The agreement to mediate may identify any mediator the parties agree upon, or the Ombudsperson, who may conduct the mediation or designate a mediator.
- If the parties do not agree to a mediator, the Ombudsperson will appoint one.
- The mediator will specify a date and time for the mediation that is convenient to both parties.
- Five days before the mediation date, both the complaining party and responding party will submit records the mediator must understand to assist the parties to agree. The parties need not provide their information to the opposing party, but some mediators sometimes recommend that the parties give it to each other. Since the mediator will not decide the case, the parties need not provide everything they would produce at a trial, or duplicate documentation provided with the Contact/Complaint form.
- The “Required Information” is the complaint form, with an explanation and identification of the parts of the governing documents of the homeowners association, from the certificate of incorporation, declarations, the bylaws, and any rules adopted by the homeowners association. In addition, each party can provide a few items of evidence or documents that would be useful for the mediator to consider, in assisting the parties to agree. Sometimes the mediator will ask each side to fill out a form that helps the parties think through the strengths and weaknesses of their position, and the agreements they seek.
- The parties may agree on what documentation the mediator will see and provide it together, or may share the information they are providing with the other party. This is not required.
- On the day and time of the mediation the parties will meet with the mediator in a conference room.
- The mediator will explain the mediation process and require each party to sign an agreement to mediate the dispute and agree that neither side will call the mediator as a witness in any other proceeding concerning the dispute.
- The mediator will invite the complaining party to describe the dispute or complaint and explain what the party wants to resolve the dispute.
- The mediator will then invite the responding party to state a response to the complaining party and tell the mediator what he wants to resolve the dispute.
- The mediator may then separate the parties, so that each is in a separate room in order to speak privately with each.
- The mediator will make a judgment about what party to speak with first.
- The mediator may ask questions of each party, and will ask what they want the mediator to convey to the opposing party as a settlement proposal.

- The mediator will not tell the other side anything that you tell him not to disclose.
- The mediator will take messages back and forth between the rooms separating the parties and discuss the settlement proposal and the response to it. The mediator will attempt to identify areas of agreement and areas of dispute and possible ways for reaching agreement.
- The mediator will continue this process as long as it appears there is room to settle.
- If the parties reach an impasse the mediator will end the mediation conference for the day. The mediator will likely contact the parties later to offer to convey additional proposals in an effort to obtain agreement that will resolve the dispute.
- When the parties agree, the mediator will assist by reducing the agreement to writing. The mediator may follow up with each party to see that each side is honoring the agreement, if that is necessary.

## **ARBITRATION**

“Arbitration” is a voluntary, confidential process in which a neutral “arbitrator” hears both sides of a controversy and decides all aspects of the case based on the facts and the law just like a judge without a jury. If the parties agree in writing, the decision will be binding, and enforceable. To request arbitration by or through the Office of the Ombudsperson, please complete and submit the Ombudsperson’s Contact/Complaint Form and the Agreement to Arbitrate form available on this website.

- Arbitration is often beneficial to both parties because of the time and money saved compared to a lawsuit or trial.
- The arbitrator will decide for the parties. This differs from mediation where the parties negotiate their own result. As in cases decided in courts, arbitration often means that at least one party is unhappy with the decision.
- The arbitrator’s role is to hear the evidence, including testimony, and review the documents and exhibits. The Arbitrator decides: what facts are the important; what law applies to the facts; and applies the law to the facts to reach a decision. The parties do not negotiate their own resolution, but if they agree on certain facts or principles, the arbitrator will consider those.
- The parties can agree in writing that the decision will bind them. If the decision is binding the parties are bound to follow the arbitrator’s decision. The Court of Chancery can enforce a binding arbitration order.
- Arbitration through the office of the Ombudsperson is voluntary. The parties must agree to arbitration, and if they do, they must be present for the arbitration hearing. However, sometimes an agreement made before there is a dispute requires the parties to arbitrate instead of suing. The bylaws of some communities require arbitration before a person can sue.

- Delaware's Uniform Arbitration Act governs arbitration. The Ombudsman's Arbitration process incorporates this law to answer questions that arise in the arbitration process. This law makes agreements to arbitrate enforceable in Chancery Court. This law is Chapter 57 of Title 10 of the *Delaware Code*. An indexed, word searchable copy of the law is available on this website on the "Important Statutes" page.

The process of arbitration often involves:

- The complaining party file fills out a Contact/Complaint form requesting arbitration and files it with the Ombudsperson, and delivers a copy to the responding party with a copy of an Agreement to arbitrate.
- The parties must agree to arbitration by signing a written agreement form.
- The parties may agree whether the arbitration will be binding or nonbinding. The written agreement to arbitrate should state whether arbitration is binding or nonbinding. Binding arbitration ends the dispute. Nonbinding arbitration may not.
- The agreement to arbitrate may identify an arbitrator satisfactory to the parties.
- If the parties do not agree to an arbitrator, the Ombudsperson can conduct the arbitration or designate who one will conduct the arbitration.
- The arbitrator will specify a date and time for the arbitration that is convenient for both parties.
- 10 days before the arbitration date the complaining party will submit all records needed for decision of the case to the arbitrator and the responding party.
- The "Required Information" is the complaint form, the governing documents of the homeowners association including the certificate of incorporation, declarations, the bylaws, and any rules adopted by the homeowners association. In addition, the complaining party must provide any other necessary evidence or documentation, including photographs, bills, or other evidence supporting the claim.
- Five days before the arbitration date the responding party must deliver all records needed for decision of the case to the arbitrator and the complaining party. However, the responding party need not provide anything already supplied by the complaining party.
- The parties may agree on what documents and exhibits the arbitrator will see and provide them together. They can also provide additional exhibits, so long as they provide copies to the other party in the time allowed.
- On the day and time of the arbitration the parties will meet with the arbitrator in a conference room or hearing room.
- The arbitrator will invite the complaining party to explain the complaint and the evidence, and explain why the arbitrator should decide for the complaining party.



- The arbitrator will then invite the responding party to state the response and explain why the arbitrator should decide for the responding party.
- The arbitrator will then ask the parties to present their witnesses and their evidence.
- The arbitrator will first ask the complaining party to present evidence, or witnesses, or testify under oath to show and explain the evidence in support of the complaint.
- The arbitrator may invite the responding party to ask questions of the complaining party.
- The arbitrator may ask questions of the complaining party.
- When the complaining party has presented all the testimony, documents and evidence supporting the complaint, and answered all questions of the responding party or the arbitrator, the arbitrator will give the responding party an equal opportunity to present testimony, documents and evidence to support its response.
- The complaining party may ask questions directed to the responding party, and so may the arbitrator.
- If the responding party raises matters that the complaining party wants to address, the arbitrator will give the complaining party an opportunity to present additional witness testimony or documentary evidence if available.
- When both parties have provided all the testimony, documents and other evidence they want the arbitrator to consider, the arbitrator will give each side an opportunity to explain what the evidence shows, the governing documents and law requires, and why the arbitrator should decide in their favor. The complaining party has the first opportunity to make a closing explanation, and may reply to the responding party's closing explanation.
- The arbitrator may decide on the spot or may decide within five days and deliver a written decision to the parties within that time. The parties may agree whether they want the arbitrator to explain the decision.

## **NEUTRAL ASSESSMENT**

“Neutral case assessment” is a less common process by which an experienced “neutral assessor” gives a non-binding, reasoned, oral or written evaluation of a controversy, on its merits, to the parties. The neutral assessor may use mediation and/or arbitration techniques to aid the parties in settling.

The process of neutral case assessment often involves:

- The procedure is the same as mediation, except:
- After hearing from the parties, the neutral assessor will provide a nonbinding, oral or written evaluation on the merits of each party's position.

- This may lead to meetings, mediation, arbitration, or direct negotiations leading to resolution of the dispute you.
- Sometimes the neutral case assessment turns into a mediation that eventually leads to settlement.

## OFFICE OF THE COMMON INTEREST COMMUNITY OMBUDSPERSON

Delaware Department of Justice  
820 N. French St., 5<sup>th</sup> floor  
Wilmington, DE 19801

### AGREEMENT FOR CONCILIATION

This is an agreement by the parties to participate in this conciliation process. I understand that conciliation is a voluntary and confidential process, which we may terminate at any time.

By signing this agreement, I indicate I am aware that information shared in the conciliation sessions and all materials prepared for conciliation are confidential. I will not try to force the conciliator to produce documents or to give evidence relating to any conciliation session in any court or administrative proceeding. I understand the conciliator will not disclose confidential information provided during the course of the conciliation or testify voluntarily on behalf of any party. I understand the conciliator may find it helpful to meet with each party separately, but the conciliator will not reveal what is said by either of us, without permission.

I further agree that:

1. No one may attend conciliation without permission of all parties and the consent of the conciliator.
2. The conciliator will not serve as the representative or lawyer for any party. I was encouraged to consult with a lawyer prior to signing any agreement.
3. Any party including the conciliator may withdraw from or terminate the conciliation at any time.
4. The conciliator cannot and will not impose an agreement or penalty. Only the parties can reach a resolution and I agree to abide by the terms and conditions of an agreement.
5. If we resolve the dispute, the parties or conciliator will put the agreement in writing and when signed, it shall reflect the wishes of each party in resolving the dispute. We intend it to be a contract between the parties instead of submitting the dispute to the court process. If a party violates the agreement, I understand either party may seek a remedy through the courts.
5. The conciliator will report to the Office of the Ombudsperson that conciliation occurred and whether it was successful.
6. If I represent a homeowners association, or other corporation, I am authorized by the board to participate and make agreements.

\_\_\_\_\_  
Party

\_\_\_\_\_  
Party

\_\_\_\_\_  
Party

\_\_\_\_\_  
Party

\_\_\_\_\_  
Conciliator  
Date:

\_\_\_\_\_  
Conciliator

**OFFICE OF THE COMMON INTEREST COMMUNITY OMBUDSPERSON**  
**Delaware Department of Justice**  
**820 N. French St., 5<sup>th</sup> floor**  
**Wilmington, DE 19801**

**AGREEMENT TO MEDIATE**

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**Filing Party (Print or type name)**

---

**Responding Party (Print or type name)**

Matter #:

This is an agreement by the parties to participate in this mediation process. I understand that mediation is a voluntary and confidential process, which we may terminate at any time.

By signing this agreement, I indicate I am aware that information shared in the mediation sessions and all materials prepared for mediation are confidential. I will not try to force the mediator to produce documents or to give evidence relating to any mediation session in any court or administrative proceeding. I understand the mediator will not disclose confidential information provided during the course of the mediation or testify voluntarily on behalf of any party. I understand the mediator may find it helpful to meet with each party separately, but the mediator will not reveal what is said by either of us, without permission.

\_\_\_\_\_ Initial here if you request the Ombudsman to refer mediation to the Court of Common Pleas Community Mediation Program.

The Mediator will contact the parties to set a date, time and place for the mediation session and exchange of documents.

The parties further agree to the following:

1. No one may attend mediation without permission of all parties and the consent of the Mediator.
2. The Mediator will not serve as the representative or lawyer for any party. I was encouraged to consult with a lawyer prior to signing any agreement.
3. Any party including the Mediator may withdraw from or terminate the mediation at any time.
4. The Mediator cannot and will not impose an agreement or penalty. Only the parties can reach a resolution, and I agree to abide by the terms conditions of the agreement.

5. If we settle the dispute, the Mediator will put the agreement in writing and when signed, it shall reflect the wishes of each party in resolving the dispute. We intend it to be a contract between the parties instead of submitting the dispute to the court process. If a party violates the agreement, I understand either party may seek a remedy through the courts.

6. The Mediator will report to, or note for the Office of the Ombudsperson that mediation occurred and whether it was successful.

7. If I represent a homeowners association, or other corporation, I am authorized by the board to mediate and make agreements.

8. Mediation will take place at either: the Carvel State Office Building or the Kent County Levy Court Building, 555 Bay Road, Dover, DE, unless the parties and the Mediator agree otherwise.

9. Procedures used at mediation will conform to the description of "Mediation" on the Ombudsman's website at:

[http://attorneygeneral.delaware.gov/fraud/cpu/ombudsman\\_adr.shtml](http://attorneygeneral.delaware.gov/fraud/cpu/ombudsman_adr.shtml)

10. The Ombudsman's current fee is \$100.00 per hour, for mediation, including travel time, preparation time, and time devoted to drafting a settlement agreement. Costs, if any, are extra.

I understand and agree to pay an equal share of the fee and costs for mediation or as otherwise agreed by the parties.

Other Agreements by the Parties:

\_\_\_\_\_  
Filing Party (Please print name)

\_\_\_\_\_  
Responding Party (Please print name)

\_\_\_\_\_  
Filing Party (Signature)

\_\_\_\_\_  
Responding Party (Signature)

\_\_\_\_\_  
Mediator

\_\_\_\_\_  
Mediator

Date: \_\_\_\_\_

## OFFICE OF THE COMMON INTEREST COMMUNITY OMBUDSPERSON

Delaware Department of Justice  
820 N. French St., 5<sup>th</sup> floor  
Wilmington, DE 19801

\_\_\_\_\_  
Filing Party (Print or type name)

\_\_\_\_\_  
Responding Party (Print or type name)

Matter #:

### AGREEMENT TO ARBITRATE

This is an agreement by the parties to participate in voluntary arbitration. I understand that arbitration is a voluntary and confidential process. Arbitration includes all contacts between the Arbitrator and any party or parties, until a final decision is rendered or the parties discharge the Arbitrator.

This agreement incorporates the issues identified in the Common Interest Community Contact/ Complaint form and attachments submitted in this matter. The parties agree that the arbitrator in this process will arbitrate any dispute arising under this agreement.

\_\_\_\_\_ **If checked here the parties agree the arbitration will be binding.** Please initial if binding.

Filing party \_\_\_\_\_

Responding party \_\_\_\_\_

If not checked above, or no agreement, or one party has not initialed, arbitration is non-binding.

\_\_\_\_\_ Check here if either party requests written explanation of the basis of the decision. If not checked, the arbitrator will deliver the result in writing, but will not explain the basis of the decision.

\_\_\_\_\_ If you agree on an arbitrator other than the Common Interest Community Ombudsperson (or designee), please identify the agreed Arbitrator. Contact Information of agreed Arbitrator:

The Arbitrator will contact the parties to set a date, time and place for the arbitration hearing and exchange of documents.

The parties further agree to the following:

- The Delaware Uniform Arbitration Act, Title 10 *Del. C.* Chapter 57 governs this Arbitration.
- At least one representative of each party with authority to resolve the dispute must participate in the arbitration hearing. Delaware counsel must attend the arbitration hearing on behalf of a corporation.
- The Arbitration proceedings are private. Only parties and their representatives may attend, unless all parties agree otherwise.

- The Arbitrator may not be compelled to testify in any judicial or administrative proceeding concerning any matter relating to service as Arbitrator in this proceeding.
- All memoranda and work product contained in the case files of the Arbitrator are confidential.
- Any communication made in or in connection with the arbitration that relates to the dispute is confidential. Confidential materials and communications are not subject to disclosure in any judicial or administrative proceeding with the following exceptions: (1) where all parties to the arbitration agree in writing to waive the confidentiality, or (2) where the confidential materials and communications consist of statements, memoranda, materials, and other tangible evidence, which were not prepared specifically for use in the arbitration hearing.
- The parties agree to protect the Arbitrator from civil liability for any act or omission in connection with the Arbitration, unless the act or omission was in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another.
- The strict rules of evidence shall not prevent the consideration of evidence or testimony.
- As to the Arbitrators' Award, the parties agree:
  - (1) The Arbitrator may grant any remedy or relief that the Arbitrator deems just and equitable and within the scope of any applicable agreement of the parties.
  - (2) In addition to a final award, the Arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders and awards.
  - (3) Upon the granting of a final award, a final judgment or decree shall be a contract between the parties and be enforced as any other contract.
  - (4) The Arbitrator is ineligible to adjudicate any subsequent litigation arising from the issues identified in the petition.

Other agreements of the parties concerning the Arbitration:

I understand and agree to pay ½ of the fee for arbitration according to the Arbitrator's or the Ombudspersons current fee schedule, which is incorporated into and made part of this Agreement, or as otherwise ordered by the Arbitrator, or agreed by the parties.

\_\_\_\_\_  
Filing Party (Please print name)

\_\_\_\_\_  
Responding Party (Please print name)

\_\_\_\_\_  
Filing Party (Signature)

\_\_\_\_\_  
Responding Party (Signature)

\_\_\_\_\_  
Arbitrator

\_\_\_\_\_  
Arbitrator

Date: \_\_\_\_\_

# **MODEL FAIR ELECTIONS PROCEDURE**



# Fair Elections Procedure

## OFFICE OF THE COMMON INTEREST COMMUNITY OMBUDSPERSON COMMUNITY ASSOCIATION VOTER AND ELECTION SERVICES<sup>25</sup>

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### ELECTION OF DIRECTORS, VOTING PROCEDURE: SECRET BALLOT

The success of Community Associations<sup>26</sup> depends in large part on the manner in which the Association conforms to and complies with the codes and laws that govern them.

The Common Interest Community Ombudsperson's Act requires the Ombudsperson to develop and publicize procedures intended to result in fair elections for members and officers of a common interest community associations.<sup>27</sup>

The following "Voting and Election Policy and Procedures" assure a community association of a professional, fair and unbiased election of officers governing the association.

The purpose of these procedures is to ensure and protect the integrity of association elections by adopting and implementing specific election processes and procedures for election by secret ballot.

The Office of the Ombudsperson will provide monitors and vote counting services, intended to result in fair elections for members and officers of a Community Association, when 15% of the total voting interest of a Community Association or 6 unit owners, whichever is greater, petition the Ombudsperson to do so. A charge commensurate with and approximating all costs necessary to defray actual expenses of the services will be payable to the Office of the Ombudsperson.<sup>28</sup>

These procedures can be adopted if bylaws of the association do not set out a fair voting procedure. These procedures are intended to provide fairness and clarity to the election of officers and members of Executive Boards, and to removal of officers from office. However,

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<sup>25</sup> Based loosely upon the California Homeowners Associations' Election process and the DUCIOA. CA HOA's procedures are in turn based upon California State Legislature adopted the "Election Procedure" laws (SB-61) in 2006 (amended several times since); the laws have been recorded in the California Civil Code and include Sections 5100 thru 5145 of the Davis Sterling Act. A number of changes and additions are included in this draft to localize the procedure to Delaware.

<sup>26</sup> "Community Associations" is a shorthand term meaning "Common Interest Community Associations" defined as:

"A unit owners' association must be organized no later than the date the first unit in the common interest community is conveyed. The association must have an executive board and the membership of the association at all times consists exclusively of all unit owners .... The association may be organized as a profit or nonprofit unincorporated association, corporation, trust, limited liability company or other lawful form of legal entity authorized by the laws of this State." 29 *Del. C.* §81-301. "Organization of unit owners' association." Associations include: "maintenance corporations"; "condominium councils"; "cooperative councils"; "homeowners associations"; or any other name appropriate to the type of Association.

<sup>27</sup> 29 *Del. C.* §2544 (5)

<sup>28</sup> 25 *Del. C.* §§2544 (6), (15).

they can be used for the many types of votes and voting without a meeting, as described in the DUCIOA:

- Assessments;
- Special Assessments;
- Amendments to Governing Documents;
- Granting of the Exclusive Rights to Use Common Area;
- Budgets;
- Amendments to plats, or property descriptions;
- Changes to rules to restrict uses, or behavior;
- Termination or merger of common interest communities;
- Any other vote required by law;
- Any subject determined by the Association;
- Any Petition signed by a majority of the Associations' members.

Associations may consider alternatives to the procedures set out here. For information concerning voting using internet based services use the search term "online voting and election" or "HOA online voting and election" your web search.

## **VOTING AND ELECTION POLICY AND PROCEDURES**

Election voting is by Secret Ballot and is restricted to unit owners only, unless voting by proxy, as explained below.

### **CALL FOR ELECTION OR OTHER VOTING MEETINGS**

The call for a meeting to conduct the business of the Association including the “Notice of Meeting and Agenda” will proceed in the same manner set forth in the Association’s bylaws. The form and timing of notice must be reasonably calculated to reach all unit owners.

An Association must provide notice of the meeting to call for elections or other voting at least 7 days in advance of the meeting, unless the bylaws provide a longer time.

Notice for this Voting Procedure is sufficient if delivered to each Unit Owner by:

- (1) hand delivery;
- (2) delivery by United States mail, postage paid, or commercial delivery service to the mailing address of each unit, or to a different address if the Unit Owner has given the Association one in writing;
- (3) electronic means, if the Unit Owner has given the Association prior written authorization and an electronic address; or
- (4) any other method reasonably designed to provide notice to the Unit Owner.<sup>29</sup>

The notice of any meeting must state the date, time and place of the meeting and the items on the agenda.<sup>30</sup>

All Association members, even those who are in arrears on payment of their assessments are entitled to vote on any matter submitted to a vote of unit owners, even if they are delinquent and other privileges have been suspended because of the delinquency.<sup>31</sup> The qualifications, powers and duties, terms of office, and manner of electing and removing executive board members and officers in filling vacancies is as provided by the bylaws.<sup>32</sup>

### **NAME IN NOMINATION**

The Association shall deliver a “Candidate Nomination Form” and an “Issue Form” to all unit owners at least sixty (60) days prior to the election. The Form must be returned to the Association at least forty-five (45) days prior to the election.

A person related by blood or marriage to a sitting board member will be presumed to have a

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<sup>29</sup> DUCIOA § 81-127. Notice.

<sup>30</sup> DUCIOA § 81-308. Unit Owners Meeting

<sup>31</sup> DUCIOA § 81-302 (11).

<sup>32</sup> DUCIOA § 81-306 (3).

conflict of interest to the Association, and may not be nominated for election to the board.

Members of the Association may nominate themselves or other members of the Association.

## **ELECTION INSPECTORS**

The Executive Board must select or appoint “independent third parties” to be the Election Inspectors or Monitors. The Board may choose to have either one or three Election Inspectors. An “independent third party” includes, but is not limited to, a volunteer poll worker with the County Board of Elections, a licensee of the Delaware Board of Accountancy, or a notary public. An independent third party may be a member of the Association, but may not be a member of the Executive Board, or a candidate for the Executive Board, or related to a member of the Executive Board or a candidate for the Executive Board.

The Executive Board must appoint Election Inspectors after the close of candidate nominations but before delivery of the secret ballots to unit owners. Election Inspectors determine where and to whom unit owners must return the secret ballots.

### **The Duties of Election Inspectors:**

1. Determine the number of homeowners or unit owners entitled to vote and the voting power of each.
2. Determine the authenticity, validity, and effect of proxies, if any.
3. Receive ballots.
4. Hear and determine all challenges and questions arising out of or in connection with the right to vote.
5. Count and tabulate all votes.
6. Determine when the polls close.
7. Determine the result of the election.
8. Perform any acts proper to conduct the election with fairness to all members in accordance with this procedure and all applicable rules of the Association regarding the conduct of the election that are not in conflict with this procedure.

## **SECRET BALLOT**

The ballots cast by unit owners must remain confidential until counted. The ballots and two preaddressed envelopes with instructions on how to return ballots shall be mailed by first-class mail or delivered by the Association to every member not less than 30 days prior to the deadline for voting. In order to preserve confidentiality, a ballot must not identify the voter by name, address, lot, parcel, or unit number.

All solicitations for votes by ballot must: 1) State the number of responses needed to meet the

quorum requirement; 2). State the percentage of approval necessary to approve each matter other than election of directors; 3). Specify the time by which the ballot must be delivered to the Association in order to be counted, which shall not be less than three days after the date the Association delivers the ballot; and 4). Describe the procedures including time and size and manner by which unit owners wishing to deliver information to all unit owners regarding the subject of the vote may do so.<sup>33</sup>

The voter must not sign the ballot.

- Once the voter completes the ballot, the voter inserts the ballot into an envelope that is then sealed. This is the secret ballot.
- The voter inserts the envelope containing the secret ballot into a second, pre-addressed return envelope and seals it.
- In the upper left-hand corner of the outer envelope, the voter must print and sign his or her name, address, and lot, or parcel, or unit number that entitles him or her to vote.
- The outer envelope must be pre-addressed to the Election Inspectors, who will tally the votes.
- The voter mails or delivers the Secret Ballot in person to the location specified by the Inspectors of Election.
  - As an alternative, the voter may complete the ballot at the meeting set for the election, in the same fashion.

The Election Inspectors only count the ballots delivered prior to the polls closing.

Voters may deliver their secret ballots in person on the day and within the time called for the election.

If only one of several owners of a unit is present at a meeting or submits a secret ballot, that owner is entitled to cast all the votes of for that unit.

If more than one of the owners is present or votes by secret ballot, the votes allocated to that unit must be in accordance with the agreement of the majority in interest of the owners, unless the declaration expressly provides otherwise. There is majority agreement if any one of the owners casts the votes allocated to that unit without protest by any of the other owners of the unit, made promptly to the person presiding over the meeting. The election inspector resolves all protests and disputes.<sup>34</sup>

## **ELECTRONIC BALLOT OR BALLOT WITHOUT MEETING**

Any action the Association may take at any meeting of members it may also take without a meeting, if the Association delivers a written or electronic ballot to every member entitled to vote on the matter.

Approval of the ballot is valid only if: 1). The number of votes cast by ballot equals or exceeds the quorum required to be present at a meeting authorizing the action; and 2). The number of approvals equals or exceeds the number of votes that would be required to approve the matter

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<sup>33</sup> DUCIOA § 81-310 (f) (2).

<sup>34</sup> DUCIOA § 81-310 (a).

at a meeting at which the total number of votes cast was the same as the number of votes cast by ballot.<sup>35</sup>

A ballot cannot be revoked after delivery to the Association because of the death, disability or revocation by the person who cast that vote, unless the declaration or bylaws state otherwise.<sup>36</sup>

Failure to follow the election procedure as adopted by the association will invalidate the ballot and the unit owner's vote.

## **PROXY BALLOT**

The "Secret Ballot" process eliminates or reduces the need for a proxy vote since the unit owner may cast their vote by mailing in the secret ballot. However, any instruction given to a proxy holder directing the vote the proxy holder is to cast shall be set forth on a separate page of the proxy that can be detached and given to the proxy holder to retain. The proxy holder shall cast the owner's vote by secret ballot.

A unit owner may revoke a proxy only by actual notice to the person presiding over the meeting for the election.

A proxy is void if it is not dated. A proxy is void if it states it is revocable without notice. A proxy terminates one year after its date, unless it specifies a shorter term.<sup>37</sup>

## **COUNTING THE VOTES**

The Election Inspector shall check off on a "sign-in sheet" that a ballot was received for a unit, as the ballots arrive. The first secret ballot received for any unit is the ballot of record and that is the vote counted. Any additional ballot(s) for the same unit are invalid and void.

All votes shall be counted and tabulated by the inspector or inspectors of the election in public at a properly noticed open meeting of the Executive Board or unit owners. Any candidate or other member of the Association may witness the counting and tabulation of the votes. No person, including a member of the Association or an employee of the management company, shall open or otherwise review any ballot prior to the time and place at which the ballots are counted and tabulated.

A majority of the votes cast in person, by proxy or by ballot at a meeting of unit owners for the election shall determine the outcome of the election, so long as the number of votes cast in favor is at least a majority of the number of votes required for a quorum for that meeting.

## **RESULTS OF THE ELECTION**

The results of the election shall be promptly reported to the Executive Board of the Association and shall be recorded in the minutes of the next meeting of the Executive Board and shall be

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<sup>35</sup> DUCIOA § 81-310 (f) (2), (3).

<sup>36</sup> DUCIOA § 81-310 (f) (4).

<sup>37</sup> DUCIOA § 81- 310 (b).

available for review by members of the Association. Within 15 days of the election, the Board shall publicize the results of the election in a communication directed to all Unit Owners.

Ballots shall be retained by the Board for no less than 90 days after the results are publicized.

# **OMBUDSPERSON'S ELECTION SERVICES**



## ELECTION SERVICES:

### Ombudsman and Department of Election Services for HOA and Condo Elections

The Office of the Common Interest Community Ombudsman is authorized:

- “To provide *monitors* and *vote counting* services to common interest community associations, intended to result in fair elections for members and officers of a common interest community association
- when 15% of the total voting interests in a common interest community association, or
- six-unit owners, whichever is greater
- *petition* the Ombudsperson to do so.” [29 Del. C. §2544 \(6\)](#).

#### Fees:

The statute requires us to “establish fees for election monitoring; vote counting or other services. The amount charged for each fee imposed must approximate and reasonably reflect all costs necessary to defray the expenses of providing the services.” [29 Del. C. §2544 \(15\)](#).

Since the statute authorizes us to “provide” “monitors and vote counting” services, we arranged with the State and County Departments of Election to provide some election services.

The Office of the Ombudsman person contracts with the HOA and Department of Elections to provide election services. An Association must contract for these services through the Office of the Ombudsperson.

The DOE will prepare an estimate to the DOJ, Office of the Ombudsperson. The DOJ may estimate additional fees for DOJ personnel and expenses. A fee approximating the actual cost associated with this service must be paid in advance to the Ombudsman’s Office.

The Department of Elections maintains a standard cost list of its election services. The DOE will estimate the costs, to the Ombudsman, in advance. The Office of the Ombudsperson also requires a \$35 fee for filing a “Contact & Complaint” form requesting election services, and may incur expenses of DOJ personnel.

The fees for services provided by the Office of the Ombudsperson (not including any fees required by the Department of Elections) are:

- Ombudsman’s Time: \$55.00 per hour
- Department of Justice staff volunteers: \$25 .00 per hour/per person

Fees are subject to change.

#### To Request Election Services:

**Fill out the Ombudsman’s “Contact & Complaint” form requesting election services.**

- Communities must petition the Ombudsman's Office with signatures of 15% of the voting interests of the community.
- Use online forms to create:
  - A **"Petition"** to the Ombudsman to provide Election services, Exhibit 1. [CLICK HERE for a form Petition](#);
  - A **"Resolution"** by the Board requesting the Ombudsman to provide election services, if the board is making the request. Exhibit 2. [CLICK HERE for a form Resolution](#);
  - Complete the **"Information Required from Community** for Ombudsperson's Election Services, Exhibit 3" from your governing documents. [CLICK HERE for a form Exhibit 3](#);
  - Complete a draft **"Agreement"** between the community, the Ombudsman and the Department of Elections for providing elections services, and agreeing to pay the Office of the Ombudsperson for the services provided. Exhibit 4. [CLICK HERE for a form Agreement](#).
  - Attach all the documents to a completed **Ombudsman's "Contact & Complaint" Form** with the election portions of the governing documents, and a check payable to the Office of the CIC Ombudsman for \$35.00 (administration fee). [CLICK HERE for a fillable copy of the Ombudsman's "Contact & Complaint" form](#). (See page 4, ¶ 2 to request Election Services.)
- The Ombudsman will contract with the DOE for the services the community desires.
- The community will pay the Ombudsman's Office, based on the DOE's estimate, and the Ombudsman's estimate of additional costs.
- The Department of Elections will provide services, that do not conflict with other scheduled State and national elections.
- The Ombudsman will pay the DOE according the estimate and the contract, and the community will reimburse the DOJ for excess expenses.  
The Department of Elections does not accommodate HOA requests during times reserved for Federal, State, local and municipal elections. Please allow adequate lead-time, usually 30 days.

The Agreement between the parties describes the information and services to be provided and the role of each party, the DOE, the Ombudsman, and the Community Association.

**The Department of Elections can provide services for several types of elections:**

- Preparing scannable Secret Ballots which will be machine read at the Department;
- Voting Machines and trained poll workers;
- The Department of Elections can accommodate proxies and write-in votes from floor nominations;
- We can accommodate weighted votes like those in certain condominiums, based on size or category of units.

If your Community bylaws do not authorize ballots, voting by mail, or electronic voting, consider adopting a bylaw or amendment to the declaration, if necessary to authorize the style of voting. Your voting procedure must comply with your Governing Documents or the DUCIOA, the Unit Properties Act, the Delaware General Corporation Law, or a court order.

**The HOA will be responsible for:**

- Preparing notices and advertising to the community about the election.
- Determining each unit's eligibility to vote, following the community's Bylaws. **NOTE:** The DUCIOA does not permit suspension of voting rights for owners delinquent in paying their annual assessments. [25 Del. C. § 81-302 \(11\)](#). This applies to communities created or approved both before and after September 30, 2009. 25 Del. C. §81-119; 81-302 (a) (11).
- Determining the percentage of ownership or voting power, if other than 1 vote per unit, as in certain condominiums.
- Providing a draft-Ballot with positions and terms identified.
- Preparing any ballot questions.
- Providing the names and any information about the candidates and eligible voters.
- Identifying a contact person for the community.

**The Association must apply to the Office of the Ombudsperson *at least one month before the election.***

**The Association must supply:**

- **Governing Documents:** declarations, certificate of incorporation and bylaws and any other document discussing election procedure;

- **A Mailing List:** of the all eligible voters, with addresses, and email addresses if available, in Excel format.
- The **date of the election**
- A **check** payable to the Office of the Ombudsman upon receipt of the estimate from the Department of Elections.



## **Agreement between**

**Department of Elections - [ ] County Office (DOE)**

**and**

**Department of Justice, Office of the Common Interest Community Ombudsperson  
(CICO)**

**and**

**[Homeowners Association Corporate Name] (HOA)  
(address)**

**This agreement is between DOE, CICO, and HOA for Election Services to HOA:**

The Office of the Common Interest Community Ombudsman is authorized "To provide monitors and vote counting services to common interest community associations, intended to result in fair elections for members and officers of a common interest community association when 15% of the total voting interests in a common interest community association, or 6 unit owners, whichever is greater petition the Ombudsperson to do so." 29 *Del. C.* §2544 (6).

1. HOA will present a petition to CICO signed by 15% of the total voting interests of their common interest community association, or 6 unit owners, whichever is greater, Exhibit 1; attached to a completed CICO "Contact/Complaint form requesting Election Services, with a \$35 filing fee, Exhibit 2; and an "Application" detailing election services requested, and information. Exhibit 3. The Application is part of this Agreement.

2. DOE and HOA shall confer and devise a mutually acceptable timetable for the timely completion of tasks enumerated below. The parties may revise the timeline by agreement. DOE reserves the ability to establish a "black-out" period for HOA elections during its peak election seasons, when agreeing to a timetable.

3. HOA requests the following election services: \_\_\_ballot preparation, \_\_\_election monitoring, \_\_\_vote counting, \_\_\_other (specify below)

HOA will:

- a. Provide to CICO and DOE the information and materials listed on the attached Exhibit 4 at least 1 month before the election date.

- b. The HOA will be responsible for:
  - Preparing notices and advertising to the community about the election.
  - Determining each unit's eligibility to vote, following the community's Bylaws. NOTE: The DUCIOA does not permit suspension of voting rights for owners delinquent in payment of their annual assessments. 25 *Del. C.* §81-302 (11). This applies to communities created or approved both before and after September 30, 2009. 25 *Del. C.* §81-119; 81-302 (a) (11).
  - Determining the percentage of ownership or voting power, if other than 1 vote per unit, as in certain condominiums.
  - A draft Ballot with positions and terms identified.
  - Preparing any ballot questions.
  - Providing the names and any information about the candidates.
  - Identifying a contact person for the HOA Election.

4. DOE will:

- a. Prepare paper ballots for machine reading
- b. Prepare print and mail envelopes and return envelopes for secret ballots, if requested
- c. Prepare deliver and operate voting machines if requested
- d. Tally the vote through machine reading and other necessary means
- e. Notify CICO of the results of the election
- f. Estimate a Bill of costs before the election
- g. Bill CICO for the costs, after the election

5. CICO will:

- a. Conduct all communication between DOE and HOA
- b. Contract with the DOE
- c. Handle collection and disbursement of all funds
- d. Provide monitoring of the election if requested
- e. Deliver ballots to the DOE, if requested
- f. Assist DOE with vote counting for issues such as write-in candidates, proxies and others, if requested

6. HOA agrees to deposit the estimated cost of the services provided by DOE with the CICO upon receipt of DOE's estimate for costs. HOA agrees to advance all costs to CICO before any election services are provided by DOE. DOE and CICO will submit a post-election bill detailing costs including any additional costs, and if this bill exceeds the pre-election deposit, HOA agrees to pay any additional costs to CICO.

7. HOA will provide all notices of election, and nomination of candidates and other information, according to its governing documents, within the time permitted in the HOA's bylaws, unless otherwise agreed.

8. CICO will request DOE's Assistance in the election and voting, and will oversee the election process.

The parties will confer and develop a proposed timeline.

The parties, as evidenced by the signatures affixed below, accept this Agreement and its conditions.

**For the HOA, this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_.**

_____	_____
Authorized Signature	Name (please print)

**For the CICO, this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_.**

_____	_____
Authorized Signature	Name (please print)

**For the DOE, this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_.**

_____	_____
Authorized Signature	Name (please print)

### **Attachments**

Exhibit 1: Petition for Election Services

Exhibit 2: Resolution of the Board for Election Services

Exhibit 3: Application Information Required for Election Services

Exhibit 4: Agreement for Election Services

Exhibit 5: Common Interest community Ombudsman's "Contact and Complaint" Form

Check for \$35 payable to "Common Interest Community Ombudsperson"

State of Delaware Department of Elections Statement of Cost of Services

## Exhibit 1

**PETITION OF: [HOMEOWNERS/CONDO/COMMUNITY ASSOCIATION NAME]**

**TO: OFFICE OF THE COMMON INTEREST COMMUNITY OMBUDSPERSON  
FOR: ELECTION SERVICES**

This \_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, we, the undersigned owners, comprising at least 15% of the total voting interests of the above-named Community Association (the "HOA") or 6 unit owners, whichever is greater, petition the Office of the Common Interest Community Ombudsperson to provide election services consisting of election monitors and vote counting services, under 29 *Del. C.* Section symbol 2544 (6) which states:

"The Ombudsperson shall have the following powers and duties:...

(6) To provide monitors and vote counting services to common interest community associations, intended to result in fair elections for members and officers of a common interest community association, when 15% of the total voting interests of the common interest community association, or 6 unit owners, whichever is greater, petition the Ombudsperson to do so."

(15) to establish: fees for meetings... Election monitoring; vote counting; or other services as provided by the Ombudsperson pursuant to this section. The amount to be charged for each fee imposed under this paragraph shall approximate and reasonably reflect all costs necessary to defray the expenses related to providing these services."

By our signatures, we each certify:

- I am a current unit owner in the above listed community.
- The community comprises \_\_\_\_\_ (#) total units.
- The required minimum number of voting interests comprising 15% for this petition is \_\_\_\_\_ (#) units.
- My signature is my own, and is genuine, and was written by my hand.
- My signature does not duplicate a voting interest for my unit.

Name of Petitioner Printed	Address of Petitioner	Signature





**[Sample: Exhibit 2]**  
**Board of Directors Resolution of**  
**[Name of Community Association, Inc.]**

We, the undersigned, being the Directors of [name of HOA], organized and existing under Delaware Law, and having its principal place of business at [address, Delaware city, Delaware, 12345], ("the Corporation"), certify that the following is a copy of the Resolution duly adopted at a meeting of the Directors of the Corporation, held and convened on [date, 2018], at which a quorum of the Board of Directors was present and voting, throughout, and that the resolution has been not been modified, rescinded, or revoked, and is in full force and effect.

**Resolved:**

Effective immediately, the Board will contract with the Office of the Common Interest Community Ombudsperson, and Delaware Department of Elections for election services including vote monitoring, ballot counting, and other services described in a written agreement.

The Board further resolves to pay the charges estimated by the parties upon acceptance of this agreement, and any balance remaining for additional expenses after election services are provided, pertaining to the election scheduled [date].

The officers of this corporation are authorized to perform the acts to carry out this corporate resolution.

_____ Director signature	_____ Printed name	_____ Date	[seal]
_____ Director signature	_____ Printed name	_____ Date	[seal]
_____ Director signature	_____ Printed name	_____ Date	[seal]

**Certificate of Secretary**

The Secretary of the Corporation certifies as the duly elected and qualified Secretary of the Corporation that the above is a true and correct record of the Resolution adopted by the Directors of the Corporation on [date].

Secretary

_____ Signature	_____ Printed name	_____ Date
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### Exhibit 3. Application: Information Required from Community for Ombudsman Election

#### Services:

<b>Issue:</b>  <b>This information is required for election monitoring, ballot creation and vote counting</b>	<b>Information:</b>  Please provide the information in this block and <b>identify its Source in the next block.</b>	<b>Source:</b> <b>Declaration §;</b> <b>Certif. of Inc. §;</b> <b>Bylaws §;</b> <b>DUCIOA §; Uniform Property Act §</b> <b>Del. Gen. Corporation Law §</b>
<b>Community Name</b>		
Community Address		
Contact Person		
Contact -Telephone		
-email		
<b>Type of Election</b>		
Annual Election of Directors		
Special Election		
Issue Approval?		
Recall of Officer?		
<b>Date of Election</b>		
Place of Election		
Time of Election		
<b>Services Requested</b>		
Election Monitors		29/ 2544 (6)
Vote Counting		29/ 2544 (6)
Prepare Ballot		
Mail and Count Ballots		
Provide and Operate Voting Machines		
Other		
<b>Notice requirements:</b>		
Nominations		
Election		
Meeting		
<b>Quorum: # or %</b> Required for the Meeting/Approval		

<b>Issue:</b>  <b>This information is required for election monitoring, ballot creation and vote counting</b>	<b>Information:</b>  Please provide the information in this block and <b>identify its Source in the next block.</b>	<b>Source:</b> <b>Declaration §;</b> <b>Certif. of Inc. §;</b> <b>Bylaws §;</b> <b>DUCIOA §; Uniform Property Act §</b> <b>Del. Gen. Corporation Law §</b>
<b>Method of voting:</b> e.g. Secret Ballot? In Person? Mail-in Ballot?		
# Votes per unit		
Weighted Vote? (condos) List Weights		
Weight of Vote? Declarant.		
<b>Eligibility of Voters</b>		
Renters Eligible?		
Declarant Eligible?		
Delinquent owners Eligible? (DUCIOA requires delinquents vote. §81-302 (a) (11))		
Who is Ineligible to Vote per Documents?		
Hearing Available?		
<i>Provide List of Ineligible Voters</i>		
<i>Provide List of Eligible Voters</i>		
<b>Nominating committee requirements</b>		
Nomination Deadline?		
Committee Report Deadline?		
Term limits? Years?		
Nominations from Floor?		
Limit # of Terms?		
<i>Provide list of eligible candidates</i>		
<b>Proxy requirements:</b>		
Statutory Requirements?		
Deadline Date to Mail proxies to voters		

<b>Issue:</b>  <b>This information is required for election monitoring, ballot creation and vote counting</b>	<b>Information:</b>  Please provide the information in this block and <b>identify its Source in the next block.</b>	<b>Source:</b> <b>Declaration §;</b> <b>Certif. of Inc. §;</b> <b>Bylaws §;</b> <b>DUCIOA §; Uniform Property Act §</b> <b>Del. Gen. Corporation Law §</b>
Deadline to return proxies		
<b>Ballot questions</b>		
Deadline for notice		
<i>Provide text of questions</i>		

<b>Please Attach:</b>	<ul style="list-style-type: none"> <li>°Ombudsman's Contact/Complaint form</li> <li>°Ombudsman Agreement for Election Services</li> <li>°Petition of &gt; of 15% of voting Interest or 6 Owners for Ombudsman to provide election services or...</li> <li>°Resolution of Board for Ombudsman to conduct election</li> <li>°Check for \$35 to "DOJ CIC Ombudsman"</li> <li>°Current DE Annual Franchise Tax Report</li> <li>° List of candidates</li> <li>°List of eligible Voters in Excel</li> <li>°List of ineligible Voters in Excel</li> <li>°Notice of Election</li> <li>°Declaration</li> <li>°Certificate of Incorporation</li> <li>°Bylaws or Code of Regulations</li> <li>°Draft Ballot</li> <li>°Draft Proxy</li> <li>°Text of issues</li> <li>°Attachments for Notice: (Budget; Annual Report, Candidate statements?)</li> </ul>
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# **TEMPLATE BYLAW FOR THIRD PARTY NOTICE TO HOA BEFORE UTILITY SHUTOFF**

# **Template Bylaw to Require Unit Owners in Common Interest Communities to Name the Homeowners' Association a Third-Party to Receive**

## **Notice of Termination of Service Under HB 177 of the 148<sup>th</sup> General Assembly.**

### **Introduction**

On September 3, 2015, the Governor signed into law a bill aimed at helping common interest communities, including condominiums, cooperatives, and deed restricted subdivisions.

When a homeowner fails to pay a utility bill, the utility has a right to turn off service including water or electricity. That can result in major damage to a home and other property. For example, if electricity is cut off during the winter and a home remains unheated, water lines can freeze, burst, and flood the property. That may cause tremendous damage to the home and to connected homes. This law requires utility companies to have a “third party notification system.” It allows a customer to name a person who will also receive notice before the utility cuts off service.

The law allows common interest communities, to adopt bylaws *requiring* homeowners to name the HOA to receive notice before cutting off utility service. The HOA can notify the homeowner, or make other arrangements depending on your bylaws.

Finally, this law requires the Common Interest Community Ombudsperson to prepare a sample bylaw that an HOA can use to require homeowners to name the HOA as a third-party to receive notice before the utility cuts off service.

Each community may choose whether to *require* unit owners to name the association as a third-party to receive notice of a utility shutoff. A community should edit this sample to conform to the language used in its governing documents, and decide if the notice will be required or is optional. As with any bylaw, the community must follow the process stated in its bylaws for adopting new bylaws.

### **Draft Bylaw:**

#### **Designation of Association to Receive Notice of Termination of Utility Service.**

Every Unit Owner must [or “may”] name the Association as a third party to receive notice that the utility intends to end service at the same time the utility sends notice to the unit owner. Utility service means gas, water, wastewater, or electricity for use or consumption in any dwelling unit. Every unit owner must sign the following statement, which the Association will complete and deliver to the utility company.

**[To:** [name, address, and of Utility company]

**Regarding:** [Unit Owners' Names, address with unit #, community name, city, state, zip code]

**Account Number:** [Unit Owner's account number for the utility]

I/we, the undersigned are the owners of the property stated above.

We designate [name and address of homeowners' Association] as a third-party to be notified before you terminate utility service at the above address, under the third-party notification program you created pursuant to 26 *Del. C.* §117 (b). This notification shall be in addition to any other person or entity I have named, or will name.

This notification is to remain in effect until changed by me or my successor.

\_\_\_\_\_  
Signature  
Print Name:

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature:  
Print Name:

\_\_\_\_\_  
Date

**By the Association:**

On behalf of [name homeowners' Association], we acknowledge our willingness to receive prior notice of termination of utility service as a third-party, on behalf of your customer, our association member identified above, but we shall not be held in any way liable to any utility by acceptance of this third-party status.

Send Prior Notice of Termination of Utility service to us as third-party designee, to:

[Name and address of association or property manager]

The Board of this Association authorized me to sign this document.

\_\_\_\_\_  
Signature  
Print Name:  
Title:

\_\_\_\_\_  
Date



# **COMMON INTEREST COMMUNITY ADVISORY COUNCIL**

# Office of the Common Interest Community Ombudsperson

Name	Organization	Address	Phone	Email
<b>Christopher J. Curtin</b> <b>Deputy Attorney General</b> Common Interest Community Ombudsman	<b>Delaware Department of Justice</b>	820 N. French Street Wilmington, DE 19801	T (302) 577-8600 F (302) 577-6499	<a href="mailto:CIC.OmbudsmanDOJ@state.de.us">CIC.OmbudsmanDOJ@state.de.us</a>  Web site: <a href="http://attorneygeneral.delaware.gov/fraud/cpu/ombudsman.shtml">http://attorneygeneral.delaware.gov/fraud/cpu/ombudsman.shtml</a>
Gail E. Launay-Tarlecki, <b>Chair</b> <b>Common Interest Community</b> <b>Advisory Council</b>	GET Property Management	Lewes, DE	T (302) 542-8387	<a href="mailto:GETPROPERTYMANAGEMENT@GMAIL.COM">GETPROPERTYMANAGEMENT@GMAIL.COM</a>

## 2021 Advisory Council Members

Name	Organization	Address	Phone	Email	Committee
Patricia Abernethy, Ph.D.	HOA Executive Board	Newark, DE	T 302-836-8447 C 302-415-9403	<a href="mailto:pabenethy@verizon.net">pabenethy@verizon.net</a>	-Mentoring Committee -Office Operations -
William P. Brady, Esq.	The Brady Law Firm PA	240 N. James Street, Suite 106 Wilmington, DE 19804	T 302-482-4124 F 302-482-4126	<a href="mailto:wbrady@bradylawde.com">wbrady@bradylawde.com</a>	-Legislative Issues-Collections; -Community Conflict Resolution /ADR -Education -Mentoring
Tony Campisi	Pennsylvania- Delaware Valley Chapter Community Associations Institute	601 S. Henderson Rd., Ste. 151 King of Prussia, PA 19406-3596	T 610-783-1315 11- F 610-783-1318	<a href="mailto:tony@cai-padelval.org">tony@cai-padelval.org</a>	- Legislative Issues-Collections; -Mechanisms for Registering Communities -Education
Michael J. Costello	Government Affairs Manager Sussex County	P.O. Box 589 Administrative Building Georgetown, De. 19947	T 302-854-5060	<a href="mailto:michael.costello@sussexcountye.gov">michael.costello@sussexcountye.gov</a>	
David Mangler	Director of Community Relations – Delaware Department of State	401 Federal Street Dover, DE 19901	T 302-857-3038	<a href="mailto:david.mangler@delaware.gov">david.mangler@delaware.gov</a>	-Mechanisms for Registering Communities-

Name	Organization	Address	Phone	Email	Committee
Frederick Fortunato	Benchmark Builders	818 First State Blvd Wilmington, DE 19804	T 302-995-6945	<a href="mailto:Fred@BenchmarkBuilders.com">Fred@BenchmarkBuilders.com</a>	Legislative Issues-Collections
Sarah Keifer, Director	Kent County Planning	555 Bay Rd Dover, DE 19901	T 302-744-2471	<a href="mailto:planning@co.kent.de.us">planning@co.kent.de.us</a>	- Legislative Issues-Collections -Operation of Ombudsman's Office
Gail E. Launay-Tarlecki	GET Property Management	Lewes, DE	T 302-542-8387	<a href="mailto:getpropertymgmt@gmail.com">getpropertymgmt@gmail.com</a>	-Education Committee -Mentoring Committee
Leslie W. Ledogar, Esq.	HOA Executive Board	Lewes, DE	T 610-659-8489	<a href="mailto:Leslie.Ledogar@Delaware.gov">Leslie.Ledogar@Delaware.gov</a>	-Community Conflict Resolution /ADR
Robert M. Goff, Jr.	City Solicitor City of Wilmington Law Department	Louis L. Redding City/County Building 800 N. French Street, 9th Floor Wilmington, DE 19801	T 302- 576-2185	<a href="mailto:rmgoff@wilmingtonde.gov">rmgoff@wilmingtonde.gov</a>	
Delores McLamb	HOA Executive Board	Bear, DE	T 571-276-0963	<a href="mailto:dmc6384485@aol.com">dmc6384485@aol.com</a>	-Mentoring - Legislative Issues-Collections -Operation of Ombudsman's Office
James Smith Assistant Land Use Manager	New Castle County	87 Reads Way New Castle, DE 19720	T 302-395-5400	<a href="mailto:JSmith@nccde.org">JSmith@nccde.org</a>	
Charles C. Stirk, Jr. Past President	Civic League for New Castle County	201 North Woodward Avenue Wilmington, DE 19805	T 302-463-2239	<a href="mailto:civicleaguefornccl@gmail.com">civicleaguefornccl@gmail.com</a>	- Nominations Committee - Legislative Issues-Collections
Chad J. Toms, Esq.	Whiteford Taylor & Preston	405 N. King St, Suite 500 Wilmington, DE 19801-3700 And	T 302-357-3253 F 302-357-3273  T 302-829-3043 F 302-357-3273	<a href="mailto:ctoms@wtplaw.com">ctoms@wtplaw.com</a>	- Legislative Issues-Collections; -Education Committee

Name	Organization	Address	Phone	Email	Committee
		209 Fifth St., Suite 200 Bethany Beach, DE 19930			
Ruth Visvardis	HOA Executive Board	New Castle County	T 302-836-8001 W 302 654 9262	<a href="mailto:visvarr@msn.com">visvarr@msn.com</a>	-Mentoring Committee
Patricia Woodring	HOA Executive Board	Sussex County	T 302-539-0666	<a href="mailto:paw-bb@mchsi.com">paw-bb@mchsi.com</a>	- Community Conflict Resolution /ADR -Co- <b>Chair</b> Education Committee
Pending	Governor's Designee for Kent County				
Pending	Senate President pro tempore designee				

## Ad Hoc Members

Name	Organization	Address	Phone	Email	Committee
Jack Hilaman	Blenheim Marketing, LLC	220 Continental Dr. Ste 410 Newark, DE 19713-4315	T 302-254-0100	<a href="mailto:jhilaman@blenheimhomes.com">jhilaman@blenheimhomes.com</a>	-Legislative Issues-Collections

# Common Interest Community Advisory Council Committees

COMMITTEE--MISSION STATEMENT	CHAIR	COMMITTEE MEMBERS
<p><b>COLLECTIONS; LEGISLATION; and PROCESSES COMMITTEE</b></p> <p>The mission of the Collections; Legislation and Processes committee is to study and advise the Ombudsperson on:</p> <ul style="list-style-type: none"> <li>-Mechanisms to increase the collection rate of common interest community assessments;</li> <li>-The feasibility of mandatory mediation, arbitration and other forms of ADR, and implementing, if feasible; and</li> <li>-Adoption, amendment or rescission of Delaware law or court rules to improve operation of common interest communities.</li> </ul>	Chad Toms, Esq. Chair	<p>William P. Brady, Esq.  Sarah Keifer  Delores McLamb  Charles Stirk  Fred Fortunato  Tony Campisi  Jack Hilaman <i>ad hoc</i></p>
<p><b>COMMUNITY CONFLICT RESOLUTION/ADR COMMITTEE</b></p> <p>The mission of the Community Conflict Resolution/ADR committee is to advise the Ombudsperson about developing conflict resolution procedures within common interest communities, including the feasibility of mandatory mediation, arbitration, or other forms of alternative dispute resolution for disputes not able to be resolved within common interest communities and, if deemed feasible, how to implement the processes.</p>	Vacant, Chair	<p>Chad Toms, Esq.  Ruth Visvardis  William P. Brady, Esq.  Leslie W. Ledogar, Esq.  Patricia Woodring</p>
<p><b>COMMUNITY REGISTRATION COMMITTEE</b></p> <p>The mission of the Community Registration committee is to study and develop mechanisms for registration of common interest communities with the State or other political subdivisions.</p>	Christopher J. Curtin, DAG	<p>Tony Campisi  David Mangler</p>

<p><b>OFFICE OPERATION COMMITTEE</b></p> <p>The mission of the Office Operation Committee is to advise the Ombudsperson in operating the Office, other than law enforcement and investigation.</p>	<p>Vacant, Chair</p>	<p>Sarah Keifer Delores McLamb Patricia Abernethy, Ph.D.</p>
<p><b>EDUCATION COMMITTEE</b></p> <p>The mission of the Education Committee is to provide training and information to Delawarean's about common interest communities. The committee plans and presents 3 educational seminars on an annual, full day basis, one in each county, and shorter presentations on an as needed, or <i>ad hoc</i>, basis.</p>	<p>Gail E. Launay-Tarlecki, Chair</p>	<p>William P. Brady, Esq. Chad Toms, Esq. Patricia Woodring Tony Campisi</p>
<p><b>MENTORING COMMITTEE</b></p> <p>The mission of the Mentoring Committee is to provide timely and useful information to all boards mentored, according to best practices. The goal is to leave the board with a better understanding of effectively running the community by adhering to the governing documents and by promoting community participation.</p>	<p>Delores McLamb, Chair</p>	<p>William P. Brady, Esq. Gail E. Launay-Tarlecki Ruth Visvardis Patricia Abernathy, Ph.D.</p>
<p><b>NOMINATIONS COMMITTEE</b></p> <p>The mission of the Nominations Committee is to identify persons interested in participating on the Common Interest Community Advisory Council or committees, and direct them to the Ombudsperson or the appropriate appointing authority, according to the Ombudsman's Act, 29 Del. C. § 2546; and to develop and execute a strategy for doing so.</p>	<p>Charles C. Stirk, Jr.</p>	

**Common Interest Community Advisory  
Council Schedule of Meetings  
2021**

**Meet 6 times in 2021.**

- **Fourth Wednesday, every other month beginning in January (*except November = (Third Wednesday).*\*)**
- **All meetings begin at 2:00, pm.**
- **All meetings allow for 2 hours.**
- **Public Invited.**
- **Public Comment period at every meeting.**
- **All meetings conducted by Zoom video conference.**
- **Agenda with meeting link emailed to our email list and Posted on Public Meeting Calendar 7 days prior to meeting.**

**All meetings 4th Wednesday, (*except November = Third Wednesday*)\***

January 27, 2021

March 24, 2021

May 26, 2021

July 28, 2021:

September 22, 2021

November 17, 2021: (*Third Wednesday* of November to avoid Thanksgiving)

**Advisory Council Meetings are announced on Delaware's [Public Meetings Calendar](https://publicmeetings.delaware.gov/#/).  
<https://publicmeetings.delaware.gov/#/>**